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## Wage Discrimination and the "Comparable Worth" Theory in Perspective

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# WAGE DISCRIMINATION AND THE "COMPARABLE WORTH" THEORY IN PERSPECTIVE

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# WAGE DISCRIMINATION AND THE "COMPARABLE WORTH" THEORY IN PERSPECTIVE<sup>1</sup>

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## INTRODUCTION

Men and women often do different jobs: most carpenters, physicians, and police officers are male; most secretaries, nurses, and telephone operators are female. Despite substantial progress in the desegregation of the workplace<sup>2</sup> vocational choices and vocational opportunities are still very much affected by factors linked to sex and race.<sup>3</sup> In the economic marketplace, most traditional "women's" jobs pay less than "men's" jobs.

In a recent issue of this Journal, Professor Ruth G. Blumrosen has argued that the wage marketplace is infected with sex and race discrimination.<sup>4</sup> The type of discrimination that she alleges is the same as that addressed by the "equal worth" or "compara-

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<sup>1</sup> This article responds to Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J. L. REF. 397 (1979).

<sup>2</sup> Between 1950 and 1976, the proportion of female lawyers and judges rose from 4.1% to 9.2%, an increase of 124%. The corresponding increases for some other occupations were: accountants, 81%; engineers, 50%; physicians and osteopaths, 97%; college and university teachers and presidents, 37%; bank officials and financial managers, 111%; buyers and purchasing agents, 152%. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, U.S. WORKING WOMEN: A DATABOOK 9, Table 8 (1977) [hereinafter cited as WORKING WOMEN]. See also note 255 *infra*; H. NORTHRUP & J. LARSON, *THE IMPACT OF THE AT&T-EEO CONSENT DECREE* (1979) (extensive progress in desegregating jobs in telephone industry under consent decree); Hedges & Bemis, *Sex Stereotyping: Its Decline in Skilled Trades*, MONTHLY LAB. REV., May 1974, at 14-22. But see WORKING WOMEN, *supra*, at 34-35, Tables 35-37 (women's earnings substantially lower than men's in all fields; little change during years 1955-1976).

<sup>3</sup> See *Wage Discrimination*, *supra* note 1, at 400 n.3.

<sup>4</sup> See note 1 *supra*. Note the distinction between *Wage Discrimination*, a short form of citation to Professor Blumrosen's article, and "wage discrimination," that article's central concept.

ble worth" movement.<sup>5</sup> Professor Blumrosen prescribes a judicial remedy: the courts should appraise the worth of jobs and should compel employers to pay wages proportional to such "worth."

The issue is not merely academic. Professor Blumrosen is a prominent consultant to the Equal Employment Opportunity Commission (EEOC). Her thesis will no doubt strike a sympathetic chord with the Chair of that agency, Eleanor Holmes Norton, who foresees the "equal worth" question as "the women's issue of the 1980's."<sup>6</sup> It is, in Norton's view, "the same kind of outsized issue [as] school desegregation" and the "most difficult issue to arise under Title VII."<sup>7</sup>

The EEOC and other plaintiffs have litigated "comparable worth" several times, and although the theory has lost consistently,<sup>8</sup> the EEOC has not given up. It continues to maintain that "comparable worth" is the law, even though the courts do not agree.<sup>9</sup> The agency has commissioned a major study by the National Academy of Sciences (NAS) on the feasibility of a bias-free job evaluation system, the development of which would be prerequisite to large-scale enforcement of the "comparable worth" theory.<sup>10</sup> The EEOC's counterpart in the Department of

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<sup>5</sup> Professor Blumrosen's wage discrimination theory addresses the same discrimination issues as the slogans "equal pay for jobs of equal worth" and "equal pay for jobs of comparable worth." See, e.g., Lewin, *The "Pink Collar" Revolution*, NAT. L.J., Dec. 10, 1979, at 1, col. 1; Crystal, *Comparable Worth?*, Wall St. J., Nov. 5, 1979, at 24, col. 3; Address by Alexis Herman, Director, Women's Bureau, Dep't of Labor, at Organizing Conference of Coalition of Labor Union Women (Washington, Jan. 24, 1980), reprinted in DAILY LAB. REP. (BNA), No. 17, at E-1 (Jan. 24, 1980). Courts rejecting the equal worth or comparable worth approach to wage discrimination under Title VII include: Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977); IUE v. Westinghouse Electric Corp., 19 Fair Empl. Prac. Cas. 450 (D.N.J. 1979), appeal pending, Nos. 79-1893 and 79-1894 (3d Cir.); Lemons v. City & County of Denver, DAILY LAB. REP. (BNA), No. 81, at D-1 (10th Cir. April 24, 1980). The slogans, however, greatly understate the proponents' demands. "Equal worth" proponents are asking not only for equal pay for jobs equal in "worth," but also for wage increases for "female" jobs that, they admit, are worth less than the comparison "male" jobs, but which, they assert, are "worth" a greater proportion of the "male" jobs' wage than they are paid. See, e.g., *Wage Discrimination*, supra note 1, at 400 & 490-501, especially the hypothetical example at 496-97. This article will use the term "comparable worth theory" to refer to the comparable worth idea as well as its synonym, the equal worth idea. However, "proportionate worth theory" would be a more accurate label.

<sup>6</sup> DAILY LAB. REP. (BNA), No. 211, at A-2 (Oct. 30, 1979) (paraphrase of Chair Norton's remarks at Conference on Pay Equity, Washington, D.C., October 23, 1979).

<sup>7</sup> *Id.*

<sup>8</sup> See cases cited in notes 4 supra and 206 & 212 and accompanying text *infra*.

<sup>9</sup> See, e.g., Address by EEOC Commissioner J. Clay Smith, Biennial Conference on Civil Rights of Ohio AFL-CIO (Feb. 6, 1980), reprinted in DAILY LAB. REP. (BNA), No. 28, at E-2 (Feb. 8, 1980). See also Remarks of Daniel G. Leach, Vice Chair of the EEOC, to the Federal Bar Association (Washington, D.C., June 9, 1978), excerpted in EMPL. PRAC. GUIDE (CCH) ¶ 5070 (July 6, 1978).

<sup>10</sup> NATIONAL RESEARCH COUNCIL/NATIONAL ACADEMY OF SCIENCES, JOB EVALUATION: AN

Labor, the Office of Federal Contract Compliance Programs (OFCCP), has included "comparable worth" in its recent Federal Contract Compliance Manual.<sup>11</sup> Thus, in the view of the federal government's equal employment opportunity agencies, proportionate pay for jobs of proportionate worth is an idea whose time is coming, if it has not already arrived.<sup>12</sup>

The EEOC's commissioning of the NAS study is an attempt to provide a scientific foundation for "comparable worth."<sup>13</sup> Professor Blumrosen's article is a parallel effort to construct a legal foundation for court appraisal of "worth." Her article argues forcefully that, when jobs are substantially segregated by sex or race, Title VII should be construed to require pay in proportion to the "worth" of jobs.

We will endeavor to show that Professor Blumrosen's article is selective and oversimplified in its "historical, anthropological, sociological and economic"<sup>14</sup> analysis. As a result, she has been misled to the conclusion that courts should in effect take judicial notice of "wage discrimination," which is a novel and controversial concept. Her article assumes, incorrectly, that wage discrimination is a proven and measurable statistic. The present article considers the legal argument that wage discrimination is prohib-

ANALYTIC REVIEW (Interim Report to the Equal Employment Opportunity Commission) (1979) [hereinafter cited as NAS REPORT]. The reasons why a bias-free job evaluation system would be necessary are analyzed in part II B *infra*.

<sup>11</sup> OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, FEDERAL CONTRACT COMPLIANCE MANUAL § 2-250.2c (1979). The OFCCP also uses the term "wage discrimination," but not in the context of comparable worth theory. As the OFCCP defines wage discrimination, it is a concept different from anything discussed in Professor Blumrosen's article or in the present article. *Id.* at § 7-30.4.

<sup>12</sup> Some additional developments also portend increased efforts to implement the comparable worth theory. In Connecticut, the legislature has mandated a pilot study of comparable worth theory in setting wages for state employees. The AFL-CIO recently decided to support the comparable worth theory. *BUS. WEEK*, Dec. 17, 1979, at 66-69. In Canada, the Legislative Assembly of the Province of Ontario has a comparable worth statute under consideration as of January 1980. The proposed legislation would amend Chapter 112 of The Employment Standards Act, 1974, § 33, to read: "No employer . . . shall . . . establish . . . any difference in wages paid to a male and to a female employee employed in the same establishment who are performing work of equal value . . . ." Value would be defined as a "composite" of skill, effort, responsibility, and working conditions. *Id.* And the Congress has taken a first step towards adoption of equal worth theory in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified at 5 U.S.C.A. § 2301(b)(3) (West Supp. 1979)). Section 2301(b)(3) provides: "[E]qual pay should be provided for work of equal value with appropriate consideration of both national and local rates paid by employers in the private sector . . . ." This ambiguous language seems to indicate that Congress is not ready to abandon the market as the measure of appropriate pay for civil service jobs, yet Congress is concerned about possible wage discrimination in the marketplace.

<sup>13</sup> NAS REPORT, *supra* note 10, at xi.

<sup>14</sup> *Wage Discrimination*, *supra* note 1, at 401-02.

ited by Title VII.

Our article focuses primarily on one legal question: Does the wage discrimination theory, as sketched by Professor Blumrosen, fall within the remedial ambit of Title VII of the Civil Rights Act? *Wage Discrimination's* factual contentions as to the existence and universality of wage discrimination deserve equally detailed analysis, but we leave that task to scholars of the pertinent disciplines, sociology and economics. We will deal with the factual contentions of *Wage Discrimination* only so far as necessary to challenge its central factual conclusion: that a demonstration of job separation should lead to a judicial inference of wage discrimination. This assertion is crucial to Professor Blumrosen's argument because it is the basis for the proposal that incumbents of sex- or race-separated jobs are entitled, by virtue of their jobs alone, to higher wages.<sup>15</sup> Because her social science evidence is unpersuasive and her legal analysis is unsound, we conclude that the courts and the Congress have been wise in refraining from attempts to impose the "comparable worth" theory

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<sup>15</sup> This article will limit its discussion to sex discrimination. Because our discussion applies equally to race and sex, it would be redundant to mention both protected groups on every occasion. Moreover, notwithstanding Professor Blumrosen's conscientious inclusion of the word "blacks" to balance each mention of women, it appears that the primary aim of the EEOC's focus on residual wage differentials is to raise the wages of women and not of minority men. The "comparable worth" theory applies only when jobs are female-intensive or minority-intensive, and the extent of job segregation is much greater for sex than for race. The EEOC's commissioned NAS REPORT, which is extensively cited in *Wage Discrimination*, explicitly ignores race discrimination, stating as the rationale for the omission that "[c]urrent public concern is almost entirely focused on sex-based discrimination." NAS REPORT, *supra* note 10, at xii. Whatever the EEOC's intentions may be, one should not lose sight of the fact that in practice Professor Blumrosen's theories very probably would benefit white women at the expense of men, particularly blacks and other minorities. The sole empirical study of a large-scale, judicially-mandated effort to end job separation reported that the promotions and new hires opened up by the AT&T consent decree went mostly to white women. H. NORTHRUP & J. LARSON, *supra* note 2, at 48, 52-54, 77, 83-99. The relative losses by minority males occurred even though eligibility for the AT&T consent decree remedies did not require minority men to show that they worked in jobs that were seventy to eighty percent filled by minorities. Professor Blumrosen's wage discrimination theory, which would impose such eligibility limits on minority men, would be even more likely to subject them to relative losses of income. Estelle James has performed extensive statistical analyses on national data to predict which groups would gain and which would lose income if men's and women's employment were "integrated." She found that college-educated white women would gain the most, and college-educated black women would gain the least. Relative wage losses to men would be eight to eighteen percent, with poorly educated white men losing the most, and poorly educated black men also suffering large losses. These relative gains and losses are all based on the assumption that higher wages for women would not attract more women into the labor market. If, as seems likely, more women *did* enter the labor market, the relative gains and losses would be greater. James, *Income and Employment Effects of Women's Liberation*, in *SEX, DISCRIMINATION, AND THE DIVISION OF LABOR* 379, 384-91 (C. Lloyd ed. 1975).

on the American economy.

Before we examine the "comparable worth" theory, Professor Blumrosen's central concept must be defined and more accurately labeled. What she calls "wage discrimination" is the idea at the heart of her arguments, but she has used the term ambiguously. On the one hand, her idea of wage discrimination seems to be<sup>16</sup> the earnings difference between sexes and races attributable to the concentration of women and blacks in lower paying jobs. "[T]he low rates of pay associated with such segregated jobs constitute the major explanation for the 'earnings gap' between minority and female workers . . . and white males. This gap has long been considered a major benchmark . . . of employment discrimination."<sup>17</sup> If wage discrimination is merely the wage difference between jobs usually held by women and jobs usually held by men, it surely exists,<sup>18</sup> but it is not thereby illegal. This first definition of "wage discrimination" is consistent with the possibility that jobs are, on the average, paid what they are "worth."<sup>19</sup>

But Professor Blumrosen relies in large part on a different idea. Wage discrimination, she writes, means "rates paid for traditionally segregated jobs [which are] discriminatorily depressed."<sup>20</sup> Under this definition, wage discrimination means lower pay for traditionally "female" jobs *based on the sex of the incumbents*, and not because the job is "worth" less than a job performed by a male. Such practices would come closer to the proscriptions of Title VII, were it not for the Bennett Amendment,<sup>21</sup> whose effect we dispute with Professor Blumrosen. But it is by no means certain that wage discrimination in this sense occurs to any important extent.

The double-barreled term "wage discrimination" is unsatisfactory for another reason as well. The term is a very close paraphrase of the language of Title VII, which forbids employers "to discriminate . . . with respect to . . . compensation" between sexes and races.<sup>22</sup> The term "wage discrimination" thus begs the

<sup>16</sup> The concept of wage discrimination "seems to be" rather than "is" because it is never defined explicitly. Our discussion of its ambiguity is based on the meanings implicit throughout the text of *Wage Discrimination*, especially at 399-401.

<sup>17</sup> *Wage Discrimination*, *supra* note 1, at 400.

<sup>18</sup> *Id.* at 410-15.

<sup>19</sup> "Worth" must be set within quotation marks because, as is explained below at part I B, the worth of a job is a concept that has meaning only in reference to the very standards that Professor Blumrosen rejects.

<sup>20</sup> *Wage Discrimination*, *supra* note 1, at 401.

<sup>21</sup> 42 U.S.C. § 2000e-2(h) (1976). See part II *infra* for an analysis of the effect of the Bennett Amendment on Title VII.

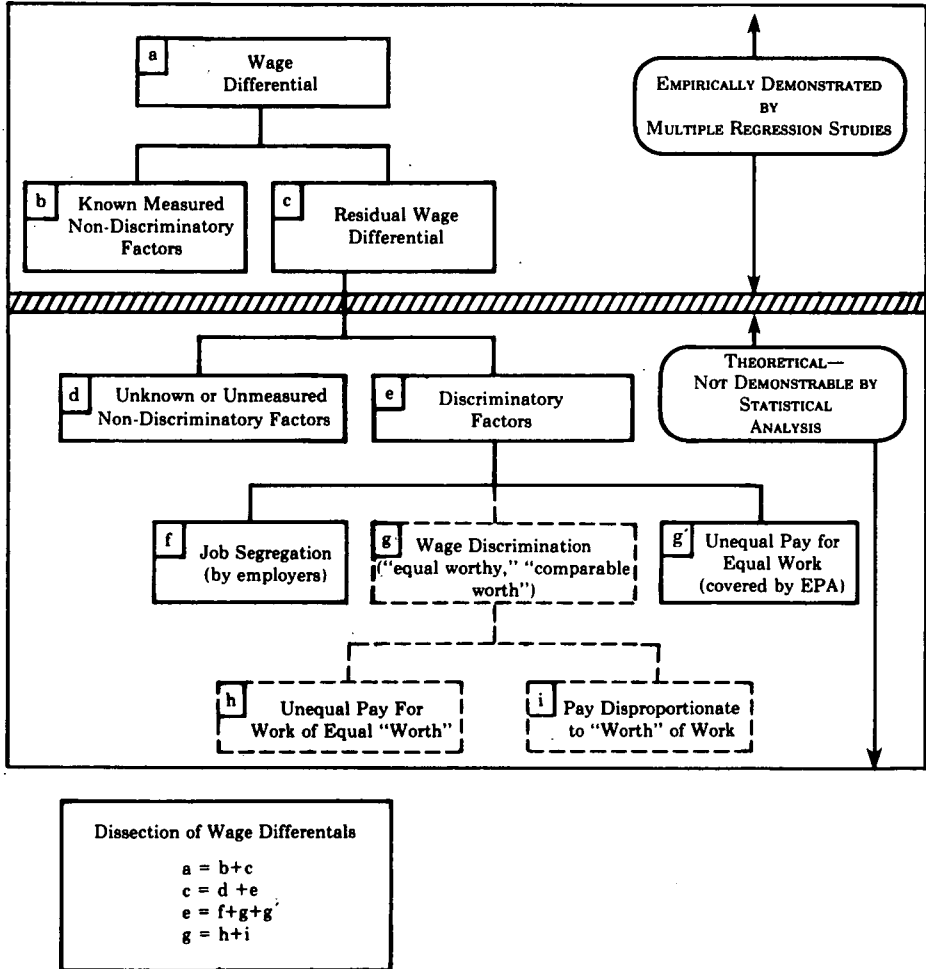
<sup>22</sup> Pub. L. No. 88-352, §§ 701-716, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e to 2000e-



question, for it supplies an affirmative answer to the central question of the entire argument: whether low wages result from illegal discrimination.

This article therefore will employ more exact terms, as the following Figure 1 shows:

FIGURE 1



15 (1976)). The act provides in pertinent part:

§ 703(a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . . .

"Wage differential" ([a] in Figure 1) is the gross difference in wages between jobs traditionally filled by men and women. Econometric studies divide the wage differential into two components. One component is the sum of all known and measured non-discriminatory factors ([b] in Figure 1); the other is the "residual wage differential" ([c] in Figure 1). This two-component dissection is as far as most statistical analyses are able to go. Residual wage differentials are *in theory* subdividable into discriminatory and nondiscriminatory factors. The non-discriminatory factors are those that are unknown, or that are known but impractical to measure ([d] in Figure 1).<sup>23</sup> The discriminatory factors are the effects of job segregation by employers<sup>24</sup> ([f] in Figure 1) and wage discrimination ([g] and [g'] in Figure 1).

To the extent (if any) that "women's" work is paid less than "men's" work *in amount disproportionate to differences in "true worth,"* wage discrimination occurs ([g] and [g'] in Figure 1).<sup>25</sup> One form of wage discrimination is unequal pay for equal, *i.e.*, identical or very similar, work ([g'] in Figure 1). This special case is the target, and the only target, of the Equal Pay Act of 1963 (EPA).<sup>26</sup> Wage discrimination that does not involve identi-

<sup>23</sup> Probably the most important of the unmeasurable nondiscriminatory factors is employee choice, *i.e.*, women choosing occupations that are "worth" less and paid proportionately less than occupations chosen by men. As a practical matter, it is impossible to assess the extent to which job segregation is a consequence of discriminatory job assignment by employers ([f] in Figure 1), and the extent to which it is a consequence of employee choice. Of course, vocational choices are themselves products of an entire cultural milieu, which may itself be discriminatory. This article, however, concerns the type of discrimination prohibited by Title VII and by the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d)(1) (1976)) [hereinafter cited as EPA]. That is, it concerns discrimination by employers. Discrimination by the total cultural milieu is not "discriminatory" within the meaning of the law, so it falls within section [d] of Figure 1.

<sup>24</sup> Hereinafter "job segregation" will mean "job segregation by employers" unless otherwise specified. See note 23 *supra* and note 45 *infra*.

Note the distinction between discrimination due to job segregation and wage discrimination. A woman discriminatorily assigned to a low status job that is paid in proportion to its true "worth" suffers only discrimination due to job segregation. If she is non-discriminatorily assigned to a job that is paid less in proportion to its true "worth" than "men's" jobs are paid, she suffers only wage discrimination. If she is discriminatorily assigned to a job whose true "worth" is less than that of the job she would have obtained in the absence of discrimination, and the wage for her job is less in proportion to its "worth" than the wage for "men's" jobs, then she suffers both from job segregation and from wage discrimination.

<sup>25</sup> This definition is the idea intended by Professor Blumrosen's definition quoted in the text accompanying note 20 *supra*.

<sup>26</sup> See note 23 *supra*. The EPA provides in part:

No employer having employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the

cal male and female jobs is the object of "equal worth" or "comparable worth" theory ([g] in Figure 1). It may consist of unequal pay for different jobs that are equal in "worth" ([h] in Figure 1), or it may consist of pay that is disproportionately unequal to differences in true job worth, *e.g.*, a male is paid one hundred percent more than a woman for a job that is alleged to be "worth" only fifty percent more ([i] in Figure 1).

Although *Wage Discrimination* is a long article, its argument may be summarized simply. First, *Wage Discrimination* points out that women and blacks work mainly in certain sectors of the economy.<sup>27</sup> Jobs filled by women and blacks tend to be low-wage jobs, and according to the article, the low wages cannot entirely be explained as the result of the several legitimate reasons for lower pay that are known to be associated with women and black workers.<sup>28</sup> Women's work, it is said, has always and everywhere been devalued, and the devaluation has resulted in lower wage rates for women and blacks than for white men.<sup>29</sup> The exclusion of women from "men's" jobs — "job segregation" — has been so intimately linked to discriminatory devaluation of women's work that, the author states, the two are really one and the same:

Thus, job segregation has an integral characteristic, the assignment of lower values to the jobs which are available to minorities and women than would otherwise be the case. This evidence establishes that it is more likely than not that where job segregation exists, the wages of those jobs assigned to minorities and women have been depressed by virtue of the fact of their minority or female status.<sup>30</sup>

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opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d)(1) (1976).

<sup>27</sup> *Wage Discrimination*, *supra* note 1, at 402-10.

<sup>28</sup> *Id.* at 410-15. The legitimate reasons that account for at least part of the sex differentials in wages and earnings are the lesser overtime worked by women, the more frequent employment of women on a part-time basis, the different kinds of training, education and counseling acquired by women, and the lesser work experience of the average woman worker. *Id.* at 414.

<sup>29</sup> *Id.* at 415-28.

<sup>30</sup> *Id.* at 427-28.

*Wage Discrimination* then sets forth a theory of the means by which employers allegedly translate their devaluation of the work of women and minorities into low wages.<sup>31</sup> Employers set wages by two principal standards: internal comparison of the "worth" of each job as compared to other jobs within the enterprise, and external comparison with the job market. Neither standard is immune from discrimination. Internal comparisons necessarily are subjective, and if those who set the wages devalue the work of women, their judgments will reflect their prejudices. Setting wages by rates prevailing in the external job market imports whatever collective stereotypes and prejudices infect the economy as a whole. *Wage Discrimination* acknowledges that in classical economic theory the job market values each job at its true worth to the employer, but the article criticizes the classical theory as outmoded.<sup>32</sup>

In a brief but very important section, *Wage Discrimination* summarizes eight published and unpublished econometric studies of sex and race differentials in wages.<sup>33</sup> By a statistical technique known as multiple regression analysis,<sup>34</sup> the authors of these studies were able to account for zero percent to fifty-five percent of the gross wage differentials between sexes and races.<sup>35</sup> The remaining wage differentials, which the present article terms the residual wage differentials, have not evaporated under the spotlight of multiple regression analysis. *Wage Discrimination* assumes that these residual wage differentials must be the fruits of illegal discrimination and contends that wage discrimination must be presumed to exist whenever jobs are occupied largely by members of one sex and/or race. This article will show that the assumption is mistaken and that the contention therefore fails.

Part II of Professor Blumrosen's article is devoted to argu-

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<sup>31</sup> *Id.* at 428-57.

<sup>32</sup> *Id.* at 445-54. In classical economic theory, the job market awards wages to each job according to its true worth, which is proportional to the value of the contribution of workers doing each job to the enterprise as a whole. If an employer offers less than the "true" value, competitors will outbid it for the available workers; if it offers more than the true value, the enterprise will lose money and become insolvent. The criticisms of this so-called "invisible hand" all argue that, although the "law of supply and demand" may prevail in the aggregate and in the long run, it is subject to local perturbations and imperfections, including those resulting from imperfect competition (monopoly, oligopoly, monopsony) and from prejudice, stereotype, and custom. *Wage Discrimination's* extended review of economic theory supports only a single contention: that the market value of a job may be more or less than its "true" economic worth.

<sup>33</sup> *Id.* at 454-56.

<sup>34</sup> See text accompanying note 85 *infra*.

<sup>35</sup> *Wage Discrimination*, *supra* note 1, at 456, Table 1.

ments that residual wage differentials are prohibited by Title VII<sup>36</sup> and that this prohibition is not restricted by the Bennett Amendment,<sup>37</sup> a statutory provision that many courts have interpreted as limiting wage discrimination claims brought under Title VII to the scope of the Equal Pay Act.<sup>38</sup> Her theory would *not* require a plaintiff doing a traditional "women's" job to show that she was paid less than she rightfully should have been paid.<sup>39</sup> The plaintiff would have to show only that her job was "segregated," *i.e.*, that more than seventy or eighty percent of the incumbents were female or minority.<sup>40</sup> In such cases, the workers would be entitled to an injunction<sup>41</sup> raising their pay unless the employer could prove that it would pay no more for the job if the employees were male. "Evidence of segregated jobs," Professor Blumrosen asserts, "justifies an inference of discrimination in compensation."<sup>42</sup>

Finally, *Wage Discrimination* considers the problem of remedies. The article recognizes that the amount of the residual wage differential may be indeterminate in any particular instance, but it argues that the courts should provide a remedy anyway.<sup>43</sup> If the exact amount cannot be specified, the courts can apply general principles, especially the alleged findings of economists that "[f]rom 20% to 50% of the wage differential between men and women has been attributed to factors which cannot be justified on grounds unrelated to discrimination."<sup>44</sup> Alternatively, the court could require the use of a "reformed" job evaluation system to rewrite the employer's wage and salary structure.<sup>45</sup> The present article will argue that such remedies would be grossly

<sup>36</sup> *Id.* at 457-501.

<sup>37</sup> 42 U.S.C. § 2000e-2(h) (1976).

<sup>38</sup> See cases cited in notes 175-76 *infra*.

<sup>39</sup> *Wage Discrimination*, *supra* note 1, at 457-59, 466.

<sup>40</sup> *Id.* at 461.

<sup>41</sup> *Id.* at 490.

<sup>42</sup> *Id.* at 465.

<sup>43</sup> *Id.* at 495-98.

<sup>44</sup> *Id.* at 497 (footnote omitted). See also *id.* at 500. The earnings of women in 1973 were about fifty-seven percent of men's earnings, *id.* at 410 n.52, so an injunction to eliminate the twenty to fifty percent of the differential that Professor Blumrosen attributes to discrimination would mean pay raises of fifteen to thirty-eight percent ( $((100-57) \times .2) \div 57 = 15\%$ ;  $((100-57) \times .5) \div 57 = 37.7\%$ ).

<sup>45</sup> *Id.* at 494. We use the term "separation" rather than Professor Blumrosen's term "segregation" because we reserve the latter term to describe discriminatory actions by employers. Male-intensive and female-intensive jobs also can occur as the result of applicant choice, even in the face of substantial efforts by employers to integrate the work force. As we shall use the terms, job *separation*—the existence of female-intensive jobs—includes the effects both of applicant choices and of discriminatory actions by employers. We will use the term "segregation" to refer only to employer actions. See notes 23-24 *supra*.

unfair and impracticable, and would cause a drastic and undesirable upheaval in the American economy.

## I. THE EXISTENCE OF WAGE DISCRIMINATION

The component of residual wage differentials that Professor Blumrosen calls "wage discrimination" is a concept far removed from such everyday facts as "wages" or "hours of work." It is a theoretical idea rather like Adam Smith's "invisible hand,"<sup>46</sup> like the inevitability of socialism in Marxist theory,<sup>47</sup> and like Keynes' multiplier value of government expenditures:<sup>48</sup> that is, residual wage differential is an inference based on the application of multi-layered, complex and controversial theory to a broad range of facts. *Wage Discrimination* asserts that residual wage differentials are so conclusively established and so universal that the courts are forced, as a practical matter, to order wage increases for all jobs in which women or minorities are concentrated, for the presumption of discrimination is, in effect, irrebuttable.<sup>49</sup> *Wage Discrimination* would lift the burden of proving discriminatory wage differentials from plaintiffs and place on employers the burden of proving the negative. For example, an electrical contractor paying craft workers (mostly male electricians) more than clerical workers (mostly female clerks and bookkeepers) would be presumed to be discriminating against the clerical workers unless the employer could demonstrate that no part of the wage differential was attributable to discrimination. The contractor could cite neither traditional job evaluation

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<sup>46</sup> A. SMITH, *THE WEALTH OF NATIONS* Book IV, ch. II (1776). See P. SAMUELSON, *ECONOMICS* 728-29, 840-41 (10th ed. 1976).

<sup>47</sup> K. MARX, *DAS KAPITAL* (1867, 1885, 1894). See generally J. ROBINSON, *ESSAY ON MARXISM* 954 n.15 (London 1942, 1964); P. SAMUELSON, *supra* note 46, at 865.

<sup>48</sup> J. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* (1936). See P. SAMUELSON, *supra* note 46, at 244.

<sup>49</sup> *Wage Discrimination's* argument is as follows: (1) Sex and race discrimination has existed and still exists. (2) One form of discrimination is job segregation, for example, hiring all male crafts workers and all female clerks. (3) Another form of discrimination is wage discrimination, that is, paying less for jobs performed by women or minorities than would be paid if those jobs were performed by white men. (4) Because job segregation is still quite prevalent, it is likely that wage discrimination is also still the rule rather than the exception. (5) The statistical technique of multiple regression analysis can identify wage differences attributable to legitimate factors such as education and experience; the remaining, unexplained statistical variance—residual wage differential—must be attributable to wage discrimination. (6) Econometric studies have demonstrated residual wage differentials. (7) Therefore, to make a prima facie case of wage discrimination, a plaintiff should have to show only that she or he works in a job category occupied mainly by women or minorities.

However, the prima facie case is irrebuttable as a practical matter. See part III A 1 *infra*.

studies nor prevailing wages in the marketplace in its defense, because both are allegedly infected with discrimination.<sup>50</sup> Professor Blumrosen boldly asserts that wage discrimination is so universally pervasive and proven as to warrant shifting the burden of proof, mandating a decision for the employee unless the employer can prove the negative. The employer's burden, as we will show below, would be an impossible one. But the structure of theory and fact upon which the claim is asserted to rest will not bear its weight.

A. *The Inadequacy of Wage Discrimination's Facts and Analysis*

In Section I,<sup>51</sup> *Wage Discrimination* cites statistics that show that jobs are to a very considerable degree still separated, i.e., women are employed — by choice or compulsion — in different jobs from men, and most women's jobs pay less. This is indisputable, but it tells us nothing about *why* most women's jobs pay less. Among the several possibilities are (1) most women choose jobs that are "worth" less than most "men's" jobs; and (2) women are often discriminatorily assigned to jobs that are "worth" less than most men's jobs.<sup>52</sup> *Wage Discrimination* does not attempt to choose among the possibilities.

Part I B<sup>53</sup> is entitled "Links Between Job Segregation and Wage Discrimination," but the reader finds therein nothing on "links": no examples of linkage and no theory of linkage. Rather, part I B consists of three independent subsections.

Subsection 1,<sup>54</sup> "The Findings of Social Sciences and Empirical Studies," summarizes sociological and anthropological evidence that invidious stereotypes of women and "women's work" are widespread in Western and other cultures. Such stereotypes are probably a necessary precondition of wage discrimination, but the existence of sexual prejudice hardly establishes "links" between job separation and wage discrimination. Proof of linkage is crucial to *Wage Discrimination's* argument, for the article proposes that occurrence of female-intensive work raises a legal presumption of wage discrimination. In this subsection, *Wage Dis-*

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<sup>50</sup> *Wage Discrimination*, *supra* note 1, at 429-41, 445-46.

<sup>51</sup> *Id.* at 402-15.

<sup>52</sup> We agree with *Wage Discrimination* that jobs which are unequal in "worth" *should* be paid unequally. We also agree with *Wage Discrimination* that if women are consigned to jobs of less worth because of their sex, they have a legal right to promotion under Title VII.

<sup>53</sup> *Id.* at 415-28.

<sup>54</sup> *Id.* at 415-20.

*crimination* cites not only scholarly studies, but also political documents<sup>55</sup> and a work of popular polemics.<sup>56</sup> Yet the subsection only asserts — without establishing or citing any authority that purports to establish — a linkage between female-intensive jobs and wage discrimination. We have made our own search for linkage between job separation and wage discrimination; such evidence as we have found indicates an *absence* of linkage.<sup>57</sup>

Subsection 2,<sup>58</sup> "The Persistence of Stereotypes," reiterates that sex stereotypes do exist and are persistent. This subsection deals with quite global beliefs such as the belief that "a woman's primary commitment is to her family."<sup>59</sup> But demonstration that such beliefs exist, even that they are widespread among both men and women, is logically far removed from the proposition to be proved: that female-intensive jobs are *ipso facto* underpaid jobs, that is, that job separation and wage discrimination are *linked*.<sup>60</sup>

<sup>55</sup> See, e.g., INTERNATIONAL LABOUR OFFICE, EQUALITY OF OPPORTUNITY AND TREATMENT FOR WOMEN WORKERS, REPORT VIII (Int'l Labour Conference, 60th Sess., 1975), cited in *Wage Discrimination*, *supra* note 1, at 417 n.88.

<sup>56</sup> K. MILLETT, SEXUAL POLITICS (1970), cited in *Wage Discrimination*, *supra* note 1, at 416 n.86. See also *id.* at 420 n.99.

<sup>57</sup> Professional sports is one of the very few types of employment in which available statistics permit independent estimates of job segregation and wage discrimination. The economists Pascal and Rapping have applied an exceptionally elaborate multiple regression analysis to the statistics of major league baseball performance, salary, and race. They found strong evidence of job segregation, both as to entry into the major leagues (some qualified minority players were still excluded) and as to job assignment (e.g., fifty-three percent of outfielders but only nine percent of pitchers were black). But job segregation was *not* linked to wage discrimination. Pascal and Rapping found no evidence of wage discrimination. Black players, on the average, earned more than whites and were more valuable players as measured by hits, runs, and other pertinent categories. Pascal & Rapping, *The Economics of Racial Discrimination in Organized Baseball*, in RACIAL DISCRIMINATION IN ECONOMIC LIFE 119 (A. Pascal ed. 1972). *Wage Discrimination* cites the book in which this study was published, *Wage Discrimination*, *supra* note 1, at 447 n.191. but the author apparently overlooked the negative implications of the Pascal-Rapping study for her thesis.

Of course, one analysis of race discrimination is hardly conclusive even as regards race, let alone sex discrimination. But the Pascal-Rapping study is significant because it is the only empirical analysis located by either Professor Blumrosen or the present writers that provides direct evidence as to the existence or lack of linkage, between job segregation and wage discrimination. When the only direct evidence points to a lack of linkage, courts cannot be expected to rule that a showing of job segregation warrants a presumption of wage discrimination.

<sup>58</sup> *Wage Discrimination*, *supra* note 1, at 420-21.

<sup>59</sup> *Id.* at 420.

<sup>60</sup> The only truly pertinent evidence cited in this subsection is *contrary* to *Wage Discrimination's* thesis. The article's handling of this evidence is revealing. *Id.* at 420 n.100. The article notes that the NAS REPORT, *supra* note 10, summarized a social psychological experiment in which men and women evaluated the job of administrative assistant. Some of the male and female evaluators were told that the job incumbent was male; others were told that the incumbent was female.



Subsection 3,<sup>61</sup> "The Factor of Historical Overt Wage Discrimination," gives examples of disproportionate wages from the period of the Second World War, thirty-five to forty years ago.<sup>62</sup> The history is interesting, but hardly conclusive as to the degree, or even the existence, of wage discrimination in the 1980's. Yet *Wage Discrimination* concludes that "[t]his evidence establishes that it is more likely than not that where job segregation exists, the wages of those jobs assigned to minorities and women have been depressed by virtue of their minority or female status."<sup>63</sup>

The inadequacy of such evidence will be apparent if one imagines the same sort of reasoning applied in a slightly different context. Suppose an age discrimination plaintiff asserts that he is underpaid. His evidence is that sociologists have found widespread devaluation of old people in American society. Historically, he demonstrates, derogatory stereotypes of older people were prevalent for many years, even as recently as the Second World War. Therefore, he asserts, "this evidence establishes that it is more likely than not that the wages of older people, myself specifically, have been depressed on the basis of age." Discrimination is so much more likely than not, the plaintiff argues, that the court ought to presume it unless the employer can rebut the presumption: every older employee ought to have his or her pay raised by court order unless the employer can prove that each would have been paid no more if he or she were younger. The burden of proof would often be impossible, and almost all older employees would get raises, regardless of the fairness of their pay.<sup>64</sup>

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The sex of the hypothetical administrative assistant made no difference to the evaluators. Men who were told that the administrative assistant was a man rated the job no higher than did men who were told that the administrative assistant was a woman. The only sex difference observed was that men rated the job somewhat higher than did women — regardless of the sex of the incumbent. Arvey, Passino, & Lounsbury, *Job Analysis Results as Influenced by Sex of Incumbent and Sex of Analyst*, 62 J. APP. PSYCH. 411 (1977).

*Wage Discrimination* describes these facts but ignores the implications, which run counter to that article's thesis. Instead, *Wage Discrimination* surmises that the experimental results may demonstrate self-hatred on the part of women, because "[w]omen tended to grade more harshly." *Wage Discrimination*, *supra* note 1, at 420 n.100. That inference would have had some support if women had evaluated the administrative assistant job lower ("more harshly") when they were told that the incumbent was a woman. But since the women evaluators rated the job the same regardless of the sex of the incumbent, *Wage Discrimination's* speculation about "self-hatred" has no logical basis at all.

<sup>61</sup> *Id.* at 421-28.

<sup>62</sup> For additional details on this period, see Clive, *Women Workers in World War II: Michigan As a Test Case*, 20 LAB. HIST. NO. 1, at 5 (1979).

<sup>63</sup> *Wage Discrimination*, *supra* note 1, at 427-28.

<sup>64</sup> The analogy is less than perfect, however, in one important respect. Many older

The last section of part I, "Translation of Discriminatory Devaluation Into Lower Pay Rates,"<sup>65</sup> begins by describing how prejudice could operate to reduce wages for women's jobs. Job evaluation systems require the exercise of judgment. If the persons making judgments are biased, their job evaluation decisions may reflect their biases.<sup>66</sup> The subsequent subsections theorize that it would be possible for bias to enter into the determination of wages by other routes: through reliance on other employers' pay scales,<sup>67</sup> through the continuation of historically biased wage rates,<sup>68</sup> or through collective bargaining by biased representatives.<sup>69</sup>

These are plausible theories, but they do not help the reader — or the courts — to answer the critical questions: does wage discrimination exist in the wage structures of particular employers, and if so, which employers, and how much wage discrimination? Theories that suggest, however plausibly, that biases can enter into the setting of wages have the same limitation as the following analysis of predatory pricing in the antitrust context: (1) merchants can attempt to gain a monopoly by predatory pricing; (2) several methods exist of implementing predatory pricing; (3) in the past, many merchants have used predatory pricing; (4) it seems probable that many merchants are using predatory pricing now; (5) therefore, the courts should presume that every merchant accused by its competitors of predatory pricing is liable for damages unless it can prove otherwise. The logical defect is that none of the four propositions, nor all of them combined, logically warrants the conclusion, which is the analog of *Wage Discrimination's* proposed presumption that all "women's" jobs are paid less than their true "worth."

Subsections 6 and 7<sup>70</sup> review the controversies among theoretical economists as to residual wage differentials. Professor Blumrosen acknowledges that in the classical economic theory of free

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people work in jobs identical to those done by younger people, and for equal pay. In those situations, the employer can prove fairness by demonstrating equal pay for equal work. In *Wage Discrimination's* comparable worth theory, the male and female jobs are different by definition (the theory applies only to comparisons of different jobs), so direct comparisons of wage rates would prove nothing.

<sup>65</sup> *Wage Discrimination*, *supra* note 1, at 428-57.

<sup>66</sup> Job evaluation systems require judgments at the levels of job analysis, job description, and selection and weighting of compensable factors. Bias could distort any of these judgments. *Id.* at 428-41.

<sup>67</sup> *Id.* at 441-43.

<sup>68</sup> *Id.* at 443-44.

<sup>69</sup> *Id.* at 444-45.

<sup>70</sup> *Id.* at 445-54.

markets, discrimination on the basis of sex is impossible.<sup>71</sup> Of course, sex discrimination *does* occur, so neoclassical economists have posited that employers may discriminate at least insofar as they are willing to pay for the exercise of their "taste" for discrimination by earning lower profits,<sup>72</sup> or insofar as they are forced into discrimination by the discriminatory "tastes" of male employees, or by their perceptions of employees' preferences.<sup>73</sup> The classical and neoclassical economic theorists have been challenged by competing theories which predict that employers can, in some circumstances of imperfect competition, profit by paying women proportionately less than men.<sup>74</sup> The bearing of these several economic theories on the issue for which they are cited might be summed up as follows. Economists disagree: some theories allow coexistence between the profit motive and wage discrimination; others do not.

The entire argument of *Wage Discrimination* up to this point is theoretical and inferential, a series of permutations of one basic theme. That theme is: (1) prejudice against women is widespread; (2) prejudice against women could result in disproportionately low wages for women's jobs; (3) therefore, the wages for women's jobs probably are lower than would be the case if the jobs were performed by men. While each premise is plausible, the syllogism is hardly conclusive and, most importantly, offers no hint as to how much disproportion in wages exists or which employers are paying disproportionately. If, as *Wage Discrimination* contends, Title VII prohibits residual wage differentials, the prohibition would have to remain a dead letter unless the courts could determine *which* employers are underpaying "women's" jobs, and *by how much* the jobs are underpaid.

The final section<sup>75</sup> of *Wage Discrimination's* part I is therefore of great importance to its thesis. In the entire 101-page article, only these four pages cite data that allegedly bear directly on the assessment of residual wage differentials in modern business enterprises.<sup>76</sup> It is surprising that this brief section consists of little

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<sup>71</sup> *Id.* at 446.

<sup>72</sup> *Id.* at 446-47. The leading theoretical work of this persuasion, G. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed 1971), has been cogently criticized in J. MADDEN, *THE ECONOMICS OF SEX DISCRIMINATION* 37-39, 42-48, 105-06 (1973).

<sup>73</sup> *Wage Discrimination*, *supra* note 1, at 447-48.

<sup>74</sup> *Id.* at 448-54.

<sup>75</sup> *Id.* at 454-57.

<sup>76</sup> In other contexts, *Wage Discrimination* cites extensively to a report that contains such data, U.S. COMM'N ON CIVIL RIGHTS, *SOCIAL INDICATORS OF EQUALITY FOR MINORITIES AND WOMEN* (1978) (cited by *Wage Discrimination*, *supra* note 1, at nn.17, 21, 22, 23, 25, 50, 56, 58, 68, 78, 82, & 232). But *Wage Discrimination* does not review the multiple regression analyses cited in this report.

more than an attempt to *explain away* the findings of the econometric studies, for they run contrary to Professor Blumrosen's thesis.<sup>77</sup> Even more surprising is the fact that the studies to which she refers do not attempt to separate wage discrimination from discriminatory job assignment.<sup>78</sup> The economic studies *Wage Discrimination* cites are, therefore, irrelevant to its thesis. The author is simply incorrect when she asserts: "These studies confirm that there is a significant relationship between job segregation and wage discrimination against the minorities and women holding the segregated jobs."<sup>79</sup> The economic studies do not and could not support any such conclusion, as will be demonstrated below.<sup>80</sup>

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<sup>77</sup> Professor Blumrosen does not specify the particular economic studies to which she refers in *Wage Discrimination*, *supra* note 1, at 454-55, as running counter to her thesis. She writes, "[t]hese studies have used," "many of the studies, however," "these analyses," "the analyst," "[t]hese studies tended," and "[t]he studies rarely examined," *id.* at 454, without citing any of the primary sources she has in mind.

<sup>78</sup> *Wage Discrimination* refers, through a summary in a secondary source, to primary sources, some unpublished, by Blinder, Cohen, Fuchs, Malkiel & Malkiel, and Oaxaca. *Id.* at 456 n.220, Table 1. These studies do not separate wage discrimination from discriminatory job assignment. *See* note 85 *infra*.

<sup>79</sup> *Id.* at 454.

<sup>80</sup> It may be noted that the tone of *Wage Discrimination*'s section on economic analyses is apologetic. Although it makes one flat (but incorrect) statement that economic analyses support the existence of wage discrimination, *see id.* at 454 & nn.33 & 92, the bulk of conclusory language in this section attempts to explain away embarrassing results:

These studies have used varying methods and different data which make comparisons difficult . . . . Many of the studies, however, defined discrimination to include only actions motivated by ill will. Discrimination identified by a showing of adverse effect on minorities and women is excluded from these analyses . . . . Hence, the conclusions reached may be understated . . . . The studies rarely examined the interaction of wage discrimination and restrictions on upward mobility together, which has been the focus of Part I of this article.

*Id.* at 454. This assertion is not only an "explaining away" qualification, it is also inaccurate. All of the econometric studies cited by *Wage Discrimination* consider job segregation and wage discrimination together. Professor Blumrosen's real complaint is not that the studies failed to examine job segregation and wage discrimination "together," but rather that the two *were* examined together, not separately. But as explained in part I of the present article, lumping together of job segregation and wage discrimination (if it occurs) is inherent in econometric methods. *Wage Discrimination* continues: "[M]uch of the difference between the studies is explainable because of different notions of what are legitimate productivity characteristics. One's choice of variables, in fact, can eliminate discrimination completely." *Id.* at 455.

The section on economic analyses then concludes with an entire paragraph of qualification:

[T]he economists' judgment . . . may be useful . . . subject to the cautionary note . . . suggested above . . . . [N]o mechanical application . . . would be appropriate. At the most, the economists' views might provide a useful starting point in the shaping of a remedy which will be based on the facts before the court, not abstract economic considerations.

*Id.*

Even if the econometric study of multiple regression residuals did tend to support

*Wage Discrimination's* citation of the economic literature consists of three secondary sources which review a substantial number of econometric research studies.<sup>81</sup> The studies all attempt to dissect the gross earnings differentials among sexes and/or races into components. Some components clearly are legitimate: for example, women are employed on the average fewer hours than men, hence they earn less.<sup>82</sup> The legitimacy of some other statistical correlates of wage differentials is open to question. For example, older blacks have, on the average, less education than older whites, and the racial earnings gap is largest among older workers.<sup>83</sup> Thus, statistically speaking, education "explains" part

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*Wage Discrimination's* position, no conclusions could be drawn with the certainty that courts would require before taking an enormous leap into judicial restructuring of the economy. Economists are aware that statistics have their limitations as well as their uses. For example, in a book cited by *Wage Discrimination*, economists Wohlstetter and Coleman conclude:

These examples suggest how hard it is to disentangle the effects of current discrimination in the marketplace from the various results of multiple past discriminations that may in turn have made it unlikely that a minority can compete currently on equal terms . . . . The proportion of the current income differences that is attributable to current discrimination in the marketplace is extremely difficult to determine and, in spite of several attempts, does not seem to us to have been measured convincingly.

Wohlstetter & Coleman, *Race Differences in Income*, in *RACIAL DISCRIMINATION IN ECONOMIC LIFE* 3, 44-45 (A. Pascal ed. 1972), cited in *Wage Discrimination*, *supra* note 1, at 447 n.191.

In sum, part I of *Wage Discrimination* attempts to establish wage discrimination as a fact, but it consists of fifty-four pages of abstract theory and general induction, and only a little more than one page of references to secondary data sources. Neither the secondary sources nor the studies on which the secondary sources are based support *Wage Discrimination's* theory. As *Wage Discrimination* obliquely recognizes, the most that can be said of the economic studies is that they do not disprove the wage discrimination hypothesis. Thus the answer to the questions, "Does wage discrimination exist, and if so, how much, and in what companies and jobs?" is: no one knows. The wage discrimination idea is novel and untested. It is, in fact, untestable by any economic or statistical method now known. Wage discrimination must remain merely an abstraction until a method is discovered to measure the "true worth" of jobs. No such method has yet appeared on the horizon.

<sup>81</sup> The secondary sources cited in *Wage Discrimination*, *supra* note 1, at 454-56 nn.218-20, are Kahne & Kohen, *Economic Perspectives on the Role of Women in the American Economy*, 13 J. ECON. LIT. 1249 (1975); Marshall, *The Economics of Racial Discrimination: A Survey*, 12 J. ECON. LIT. 849 (1974); and Oaxaca, *Theory and Measurement in the Economics of Discrimination*, in *EQUAL RIGHTS AND INDUSTRIAL RELATIONS* (L. Hausman, O. Ashenfelter, B. Rustin, R. Shubert, & D. Slaiman eds. 1977).

<sup>82</sup> Cohen, *Sex Differences in Compensation*, 6 J. HUMAN RESOURCES 434, 442-43 (1971). Cohen's econometric analysis reported that, among nonprofessional men and women employed full time, the average workweek for men was more than 10% longer than for women. The greater number of hours worked by men accounted for about 20% of the difference between the sexes in gross earnings. The proportion of the earnings gap accounted for would be greater if premium overtime pay were taken into consideration.

<sup>83</sup> See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, *SOCIAL AND ECONOMIC CHARACTERISTICS OF THE OLDER POPULATION*: 1978 (Special Studies Series P-23, No. 85, 1979), at 16, Table 14 (education and race) & 24-27, Tables 22-24 (income and race); F. DAVIS, *THE*

of racial earnings differences. Whether educational differences justify earnings differences morally or legally is a question that the economists recognize as beyond the scope of their statistical analysis. At least one component of statistical dissection clearly represents illegal discrimination: unequal pay for equal work, when experience, seniority, and productivity are also equal. But, as acknowledged in one of the reviews that *Wage Discrimination* cites, this practice is so rare that it is of little or no practical consequence.<sup>84</sup>

The statistical technique of such dissections is multiple regression analysis. The economist gathers a number of data about each employee, for example, sex, race, age, education, experience, seniority, and geographic region, as well as earnings. Although no two employees are identical, multiple regression allows the statistician to estimate what earnings would have been if the employees were identical in every respect measured except the variables of interest, e.g., sex and race.<sup>85</sup>

Statistical dissection cannot separate the effects of job separation from wage discrimination. Consider, for example, the electrical contractor, mentioned above, which pays its crafts workers, primarily male electricians, more than its clerical workers,

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BLACK COMMUNITY'S SOCIAL SECURITY 71 (1978) ("The ratio of Black to White median income is highest in the 14 to 24 age group and consistently declines for each age level down to, and including, the 55 to 64 age group.").

<sup>84</sup> Kahne & Kohen, *supra* note 81, at 1261, cited in *Wage Discrimination*, *supra* note 1, at 454 n.218.

<sup>85</sup> It must be emphasized that multiple regression yields *estimates*, which are subject to error. Among the several sources of error is the fact that the statistical model makes assumptions that are unlikely to be correct. For example, multiple regression assumes linear correlations: if education is quantified as number of years of schooling, the technique assumes that the difference between a second grade and a fifth grade education is worth exactly as much as the difference between a ninth grade and a twelfth grade education. The technique also assumes homoscedasticity (homogeneous distribution of variance) and a number of other statistical symmetries that are unlikely to exist in real-world data. Perhaps most important, multiple regression cannot distinguish the effects of discrimination from the effects of legitimate factors that it was not possible to measure. For example, the personnel files of many employers record college degrees but not fields of study. An econometric study based on such files is forced to count an assistant controller with an M.B.A. in accounting and finance as "equal" in education to a junior accountant with an M.S.W. (master's degree in social welfare). Only one of the eleven results reported in *Wage Discrimination*, *supra* note 1, at 456 n.220, Table 1, controlled for field of study, and that one study, Malkiel & Malkiel, omitted such pertinent control variables as age and race. The differences identified as "unexplained differential" in *Wage Discrimination's* Table 1 are *not* estimates of discrimination, as is incorrectly asserted in note b to Table 1. The "unexplained differential" consists of estimates of the effects of discrimination *plus all unmeasured legitimate sources of wage differences*. In drawing attention to these limitations, we do not mean to disparage multiple regression or its economist practitioners, but to draw attention to limitations inherent in the technique, limitations which *Wage Discrimination* passes over rather casually, *id.* at 455. These limitations are further discussed in part I B 1 c *infra*.

primarily female clerks and bookkeepers. A multiple regression analysis might dispose of part of the gross earnings difference by legitimate factors,<sup>86</sup> but in all probability, there would remain a substantial "residual" difference. The residual difference consists of three components that can be identified theoretically, but which cannot be separated in the realm of real-life data. One component of the "residual" is the sum of all unmeasured legitimate reasons for wage differences.<sup>87</sup> A second component is the effect of discriminatory job assignment. That is, if (1) the electrician's job is "worth" more than the job of clerk, (2) both jobs are paid what they are worth, and (3) absent discrimination, some of the female clerks would have been electricians, then (4) the female clerks who would have been electricians have lost wages because of discriminatory job assignment.<sup>88</sup> The last component of the statistical residual is that portion, if any, due to wage discrimination. For example, the work of the clerk may be equal in "worth" to the work of the electrician, but may be paid only two-thirds as much, or the clerk's job may be "worth" two-thirds as much as the electrician's but may be paid only one-half as much. This is the "pure wage discrimination" referred to in *Wage Discrimination*.<sup>89</sup>

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<sup>86</sup> For example, the electricians may work a longer workweek, more overtime, and in less pleasant surroundings than the clerks.

<sup>87</sup> See FIGURE 1 in text following note 22 *supra*.

<sup>88</sup> Statistical analyses tend to overestimate the magnitude of employer job segregation because no means is available to separate the effects of job segregation by employers from job segregation by choice of individual employees. Professor Blumrosen acknowledges, as do almost all commentators, that in American society women have been conditioned to enter traditional "women's" vocations by the entire social milieu. *Wage Discrimination*, *supra* note 1, at 416-21. See also J. GALBRAITH, *ECONOMICS AND THE PUBLIC PURPOSE* 37 (1973); Cohen, *Sex Differences in Compensation*, 6 J. HUMAN RESOURCES 434, 437-38 (1971); Fuchs, *Differences in Hourly Earnings Between Men and Women*, MONTHLY LAB. REV., May 1971, at 9; Lloyd, *The Division of Labor Between the Sexes: A Review*, in SEX, DISCRIMINATION, AND THE DIVISION OF LABOR, *supra* note 15, at 1, 15; Sawhill, *The Economics of Discrimination Against Women: Some New Findings*, 8 J. HUMAN RESOURCES 383, 391 (1973); Stephenson, *Relative Wages and Sex Segregation by Occupation*, in SEX, DISCRIMINATION, AND THE DIVISION OF LABOR, *supra* note 15, at 175, 197-98; Gwartney & Stroup, *Measurement of Employment Discrimination According to Sex*, 39 SOUTHERN ECON. J. 575 (1973). If the hypothetical electrical contractor's electricians are almost all male, that job segregation may be partly the result of the employer's discriminatory rejection of qualified female electricians and partly the result of a lack of female applicants for electrician jobs. The employer is legally accountable only for the former, but statistical studies, unable to distinguish between employer preferences and applicant choices, frequently lump the two together and attribute the entirety of job segregation to employer discrimination. In practice, applicant choice is a powerful factor. See, e.g., H. NORTHRUP & J. LARSON, *supra* note 15, at 60-64 (extensive recruiting necessary to attract modest number of female "outside" electrical craft trainees; program suffers heavy female attrition).

<sup>89</sup> *Wage Discrimination*, *supra* note 1, at 455-56 n.220.

Economists who have studied discrimination generally have not attempted to measure the "worth" of jobs independently of wage rates.<sup>90</sup> No yardstick exists by which such measurements could be made.<sup>91</sup> Without an independent measure of job worth, it is impossible to distinguish statistically between the results of job separation and the results of "pure" wage discrimination. Moreover, as noted above, none of the forms of discrimination can be dissected statistically from legitimate but unassessed reasons for different pay. Consequently, *Wage Discrimination's* reading of the economic literature is seriously misleading. The literature shows no "significant relationship between job segregation and wage discrimination."<sup>92</sup> The literature does not even demonstrate that "pure" wage discrimination exists, nor do *Wage Discrimination's* economic authorities purport to do so.<sup>93</sup> The most that multiple regression analyses can tell us is that some of the gross earnings differences between the sexes are accounted for legitimately, while the remainder must result from unmeasured legitimate sources, and/or from job separation, and/or from wage discrimination.

### B. Problems With Wage Discrimination's Factual Thesis

In its Part I, *Wage Discrimination* attempts to establish "the factual aspects of the thesis that wage rates of jobs into which women and minorities have been historically segregated are likely to be depressed because those jobs are occupied by 'disfavored groups.'"<sup>94</sup> This factual proposition is demonstrated, according to *Wage Discrimination*, by "historical, anthropological, sociological, and economic studies."<sup>95</sup> In summarizing *Wage Discrimination's* evidence, the present article has drawn attention to some of the most apparent inadequacies of reasoning and of evidence. However, the defects of *Wage Discrimination's* analysis run deeper than the flawed logic and thin evidence that would warrant a "not proven" verdict. More fundamentally, the

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<sup>90</sup> See, e.g., SEX, DISCRIMINATION, AND THE DIVISION OF LABOR, *supra* note 15; WOMEN IN THE LABOR MARKET (C. Lloyd, E. Andrews, & C. Gilroy eds. 1979).

<sup>91</sup> See part I B 1 c *infra*.

<sup>92</sup> *Wage Discrimination*, *supra* note 1, at 454.

<sup>93</sup> The economic studies cited by *Wage Discrimination* (see note 78 *supra*) calculate "unexplained differential" in wages between men and women or between whites and blacks. *Wage Discrimination*, *supra* note 1, at 456 n.220, Table 1. The "unexplained differential" includes unmeasured legitimate causes of wage differentials and the effects of all sources of discrimination, i.e., all the components of [c] in Figure 1 *supra*. See note 85 *supra* and part I B 1 c *infra*.

<sup>94</sup> *Wage Discrimination*, *supra* note 1, at 401.

<sup>95</sup> *Id.* at 401-02.



evidence runs strongly counter to *Wage Discrimination's* thesis on all three dimensions of its attempted proof: theory, authority and fact.

1. *The logic of economic theory* — The immediately preceding section of this article has demonstrated that the economic studies which, *Wage Discrimination* supposes, reveal wage discrimination actually show no such phenomenon. Instead, the economists have demonstrated residual wage differentials, a term that includes unmeasured nondiscriminatory factors, the effects of job separation, and the results, if any, of wage discrimination. The problem for a wage discrimination theory, however, is not just that available data are unsatisfactory, but also that the entire idea of wage discrimination is grounded on an economic theory, the logic of which precludes an assessment of wage discrimination.

Wage discrimination is a concept that has meaning only with respect to the worth of jobs. If a female nurse's work is worth seven-eighths as much as that of a male real estate appraiser, but is paid only five-eighths as much, it may be argued that wage discrimination is occurring.<sup>96</sup> The basic idea of wage discrimination is that wages are disproportionate to the worth of work performed. Absent some way of establishing the "worth" of jobs, wage discrimination loses all meaning. It must further be shown how the worth of work should be measured.

One could attempt to evaluate the worth of jobs in three important ways. These may be called (a) market value, (b) job evaluation systems, and (c) marginal productivity analysis.

a. *Market value.* The market value of a job is the common sense meaning: the conjunction of what an employer is willing to pay and what a worker is willing to accept. "Worth" in this sense may be determined individually, as when an executive negotiates an employment contract, or collectively, as in bargaining between unions and employers. Market value serves well enough for most purposes, and it has the great virtue of determinateness. A job's market value is what is paid. For purposes of detecting wage discrimination, however, market value is of no use. As *Wage Discrimination* points out,<sup>97</sup> market value includes whatever distortions discrimination may cause.<sup>98</sup>

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<sup>96</sup> See, e.g., *Lemons v. City & County of Denver*, 17 Fair Empl. Prac. Cas. 906 (D. Colo. 1978), *aff'd*, DAILY LAB. REP. (BNA), No. 81, at D-1 (10th Cir. April 24, 1980).

<sup>97</sup> *Wage Discrimination*, *supra* note 1, at 441-43.

<sup>98</sup> It would be possible to assess the "worth" of jobs by a criterion closely related to, but distinct from, market value: the opinions of employees as to a fair wage for each job. The opinion standard would, of course, be of no use for proving wage discrimination, as it would be subject to the same kinds of biases as the market value standard.

b. *Job evaluation systems.* Job evaluation systems attempt to assess such factors as skill, effort, responsibility, and working conditions, so as to rank the relative worth of jobs.<sup>99</sup> But for a number of reasons which are ably set forth in *Wage Discrimination*,<sup>100</sup> job evaluation systems are inherently too subjective to be useful as anchors for the concept of wage discrimination. Job evaluation systems are basically methods for systematizing and recording subjective judgments, and at each stage in the process — job analysis, job description, selection of compensable factors, weighting of compensable factors, and the selection of the breadth of jobs to which a particular system will be applied — the necessarily subjective judgments inevitably incorporate individual and societal biases.<sup>101</sup> *Wage Discrimination* is correct in

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However, opinions concerning the fairness of men's and women's wages do have important implications for the practicality of the remedies that *Wage Discrimination* would prescribe. An employer, court, or legislature that attempts to impose a pay schedule that violates employees' beliefs about fairness of wages will produce low morale, high turnover, and loss of productivity. Thurow, *Equity Concepts and the World of Work*, in *MEASURING WORK QUALITY FOR SOCIAL REPORTING* 207, 207-13 (A. Biderman & T. Drury eds. 1976).

Men's and women's beliefs about the fairness of their pay have been studied. R. CURTIN, *INCOME EQUITY AMONG U.S. WORKERS* (1977). Curtin's data show widespread satisfaction with the fairness of one's own pay as compared with the pay of others, and the proportion of satisfied workers increased between an initial survey in 1973 and a later survey in 1975. *Id.* at 36. When respondents were asked to compare their pay rate with that of others in their own occupation, women were more often satisfied with the fairness of their pay than were men. When the comparisons were across occupations, e.g., comparing a secretary with an electrician, the proportions of women and men who felt that they were paid the "amount deserved or more" were very nearly equal.

The implication of this data is that if *Wage Discrimination's* proposals were adopted, and most women's wages substantially increased, a large proportion of women would be paid much more, and a large proportion of men much less, than they believe their jobs are worth. If the existence of wage discrimination is not even perceived by most workers, male and female alike, it would be a bold employer, court, or Congress that imposed such a remedy.

<sup>99</sup> NAS REPORT, *supra* note 10, at 1-7. See also *Wage Discrimination*, *supra* note 1, at 428-34.

<sup>100</sup> *Wage Discrimination*, *supra* note 1, at 434-41.

<sup>101</sup> *Id.* at 435-41. The quest for a purely technocratic method of wage determination—a job evaluation system independent of subjective judgments and biases—is futile. Job evaluation systems mute individual biases, but a committee's consensus is not objective just because several people participated. As prospective yardsticks for assessment of job "worth," job evaluation systems also suffer from the problem that no one system is adaptable to all jobs. Even for jobs as similar as those in the steel and aluminum industries, the job evaluation system developed for one industry was unsuited to the other. NAS REPORT, *supra* note 10, at 6. If jobs in the steel and aluminum industries require different job evaluation systems, it would seem unlikely that a single system can serve as the measure of "worth" for the entire spectrum of jobs, from abrasive tool operator to zymurgist. An additional difficulty that would confront an effort to set wages according to a universal job evaluation system is the fact that job evaluation systems have purposes and uses other than the setting of wages. See, e.g., Suskin, *Job Evaluation—It's More Than a Tool For Setting Pay Rates*, 31 PUB. PERSONNEL REV. 283 (Oct. 1970). A multi-

noting that job evaluation systems are inherently too subjective to be satisfactory observation points from which bias could be detected.

The EEOC has commissioned a study of job evaluation systems by the NAS in the hope that a new system, unbiased and universally applicable, can be developed.<sup>102</sup> Such a job evaluation system (JES) presumably would be the fulcrum from which all types of pay "inequities" could be levered into line. If the NAS's interim report<sup>103</sup> presages its final conclusions, the EEOC will be disappointed. According to the NAS Report, job evaluation systems are problematic and have troublesome features.<sup>104</sup> The best-known JES, the proprietary Hay Associates system, is extremely subjective and fails to distinguish well at lower job levels.<sup>105</sup> Different JES's can produce quite different evaluations of the "worth" of the same job.<sup>106</sup> Even in two basic metal industries, steel and aluminum, which cover a very small segment of the spectrum of all jobs, it has proved impossible to develop a single JES suitable to both.<sup>107</sup> And even if a universally acceptable and fair JES were possible, the unreliability of ratings probably would preclude its use.<sup>108</sup> All in all, the NAS Report concludes, "the evidence is not particularly encouraging."<sup>109</sup>

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purpose system will necessarily be a compromise and not precisely fitted to any single purpose.

<sup>102</sup> See text accompanying note 10 *supra*. The Women's Bureau of the Department of Labor also plans to fund research with this objective. Remarks of Alexis Herman, Director, Women's Bureau, to Organizing Conference of Coalition of Labor Union Women, Washington, D.C. (Jan. 24, 1980), in *DAILY LAB. REP. (BNA)*, No. 17, at E-1 (Jan. 24, 1980).

<sup>103</sup> NAS REPORT, *supra* note 10.

<sup>104</sup> *Id.* at xii, 30.

<sup>105</sup> *Id.* at 22-23.

<sup>106</sup> *Id.* at 35, 39.

<sup>107</sup> *Id.* at 6.

<sup>108</sup> *Id.* at 41. Reported reliabilities of job evaluation systems range from about .34 to about .95 on the correlation coefficient scale of 0 to 1. *Id.* Even when reliability is as high as .90, serious misclassification will occur with considerable frequency. For example, if jobs were graded on a scale from 1 to 16, and reliability were .90, one of twenty jobs whose true grade was 8 would be misgraded into grades 1-4 or grades 12-16. While a reliability of .90 is satisfactory for purposes of aggregate statistical analysis, a serious misgrading of 5% of jobs obviously would be unacceptable. The NAS REPORT properly concludes: "[J]ob evaluation procedures may not be very reliable given the purpose they are meant to serve." *Id.*

<sup>109</sup> *Id.* at 40. See also Paterson & Husband, *Decision Making Responsibility: Yardstick for Job Evaluation*, 2 *COMPENSATION REV.*, No. 2, at 21 (1970). This article, cited by *Wage Discrimination* for another purpose, is highly critical of existing job evaluation systems. On the failure of job evaluation systems as applied to high-level jobs, see G. WASHINGTON & V. ROTHSCHILD, 1 *COMPENSATING THE CORPORATE EXECUTIVE* 23 n.75 (3d ed. 1962); Mautz & Rock, *The Wages of Management*, 11 *U. FLA. L. REV.* 474, 508 (1958). See also Patton, *What Is an Executive Worth?*, 39 *HARV. BUS. REV.* 65, 72 (March-April 1961).

c. *Marginal productivity analysis.* Marginal productivity analysis measures the worth of work by the value that the work adds to the total output of the enterprise.<sup>110</sup> For example, suppose that widgets are manufactured by first stamping them from sheets of widget-stock, then polishing them. A widget stamper and a widget polisher each can process 100 widgets per day. If widget stock costs 10¢ per widget, and if stamped but unpolished widgets are worth 50¢ each, and if polished widgets are worth \$3.00 each, the work of the polisher is worth \$250 per day, while the work of the stamper is worth only \$40 per day.<sup>111</sup> This is what economists usually mean when they speak of the theoretical or "true worth" of jobs.<sup>112</sup>

In spite of the intellectual elegance of marginal productivity theory, real-world wages are rarely, if ever, set by reference to marginal productivity analysis.<sup>113</sup> One reason is that few enterprises are as conveniently compartmentalized as the theoretician's widget factory. The typist, the security guard, the supervisor, the maintenance mechanic, and the receptionist all perform vital functions in modern industry, but economists recognize that it would be futile to try to identify the increment in profit

<sup>110</sup> N. TOLLES, *ORIGINS OF MODERN WAGE THEORIES* 19-20 (1964).

<sup>111</sup> The example is oversimplified for purposes of illustration, as it does not take capital costs into account. If the stamping machine had a fair rental value of \$10 per day, and the polishing machine rented for \$220 per day, the productivity of the labor involved in the two jobs would be equal.

<sup>112</sup> Where the schools of economic theory differ is in the size, distribution, and explanation of differences between the "true worth" of jobs as measured by marginal productivity and the "worth" of those same jobs in the marketplace. See, e.g., N. TOLLES, *supra* note 110, at 8-24. For a more technical explanation of marginal productivity as the theoretical measure of job worth, see P. SAMUELSON, *ECONOMICS* 541-45 (10th ed. 1976).

<sup>113</sup> See, e.g., A. WOOD, *A THEORY OF PAY* (1978); Belcher, *Employee and Executive Compensation*, in *EMPLOYMENT RELATIONS RESEARCH* 73, 77-80 (H. Heneman, Jr., L. Brown, M. Chandler, R. Kahn, H. Parnes & G. Shultz eds. 1960) (survey of literature shows that important determinants of wages are labor market prices, union pressure, labor supply, product market competition, expected profits, employee satisfaction, and company prestige; marginal productivity is not mentioned); Foster & Kanin-Lovers, *Determinants of Organizational Pay Policy*, 9 *COMPENSATION REV.*, No. 3, at 35 (1977) (marginal productivity not mentioned); Woodhead, *Are You Using the Right Pay Policy?*, 40 *CANADIAN BUS.*, No. 12, at 40 (1975) (pay determined by several factors, not including marginal productivity). The fact that wages are set according to factors other than marginal productivity analysis does not imply that productivity and wages are unrelated. In the long run, but not in the short run, productivity and wages are closely related. Belcher, *supra*, at 76.

One reason that marginal productivity analysis is not used in setting wages is that the necessary data do not exist. L. THUROW, *POVERTY AND DISCRIMINATION* 44 (1969). Probably the closest approach to pay on the basis of marginal productivity is in the compensation of salesworkers on a commission basis. Commissions are only a rough approximation of marginal productivity for a number of reasons, one of which is the competitive market in sales commissions. Employers must pay the "going rate" of commissions even if it exceeds the current profit per sale.

that each such job adds to the total enterprise.

Nevertheless, if wage discrimination were to have a practical meaning, the discrimination would be measured by reference to marginal productivity. This would apply both in economic theory and in a common sense meaning of "wage discrimination." To say that a person is not paid "what the job is worth" often means that there is a larger difference than is normal between the value of the job to the enterprise, in the marginal productivity sense, and the wages paid for the job. Hence the job is paid less in proportion to its marginal productivity than are other jobs.

Because the marginal productivity of jobs can almost never be measured directly, economists have used the indirect approach of multiple regression analysis.<sup>114</sup> If one assumes that everyone is employed in a job commensurate with his or her abilities, and if, on average, abilities are highly correlated with such measurable job qualifications as education and experience, then productivity would increase with job qualifications. If equally "qualified" groups of men and women, *e.g.*, college graduates, are paid differently, discrimination may be the explanation. It is this kind of indirect and inferential analysis that is employed in the econometric studies diagrammed in Figure 1 of this article,<sup>115</sup> and whose results are summarized in *Wage Discrimination's* Table 1.<sup>116</sup>

The logic of multiple regression analysis, however, precludes direct evidence of wage discrimination. Econometric studies of residual wage differentials measure differences after statistical adjustments to equate groups for education, experience, and other surrogates for the unmeasurable variable, productivity. But the residual wage differentials thus identified cannot be separated into effects of differential job choice, job segregation, and wage discrimination ([d], [f] and [g] respectively in Figure 1). The reason will be apparent if one considers again the hypothetical example of the electrical contractor. Suppose the contractor's receptionist, a female, earns one-half the salary of the male electrical crafts workers, and suppose she is equal to the average electrician in experience, education, and seniority. With no inde-

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<sup>114</sup> See, *e.g.*, R. TSUCHIGANE & N. DODGE, ECONOMIC DISCRIMINATION AGAINST WOMEN IN THE UNITED STATES 29-50 (1975) [hereinafter cited as ECONOMIC DISCRIMINATION]; Stevenson, *Relative Wages and Sex Segregation by Occupation*, in SEX, DISCRIMINATION, AND THE DIVISION OF LABOR, *supra* note 15, at 175; M. Hamilton, A Study of Wage Discrimination by Sex: A Sample Survey in the Chicago Area (unpublished Ph.D. Dissertation, Univ. of Pa. 1969).

<sup>115</sup> See text accompanying note 22 *supra*.

<sup>116</sup> *Wage Discrimination*, *supra* note 1, at 456 n.220.

pendent measure of the marginal productivity of jobs, one has no evidence to inform a choice among the following possibilities:

- (a) The residual wage differential is entirely due to job segregation. That is, the receptionist is fairly paid in relation to the work that she does, but she has been discriminatorily assigned to a job that is "worth" less, in the marginal productivity sense, than the jobs reserved for the male electricians.
- (b) The same as (a), but the receptionist's job assignment is hers by her choice; the discrimination was in her upbringing, not by her employer.
- (c) The residual wage differential is entirely due to wage discrimination. That is, the marginal productivity of the receptionist's job, if it could be measured, would be equal to that of the electrician's; it is because the receptionist's job is "women's work" that it is underpaid.
- (d) Any combination of (a), (b), and (c).

Except in rare instances,<sup>117</sup> all econometric studies of wage discrimination must use the same basic logic and thus must produce equally inconclusive results. One is forced to the conclusion that for purposes of evaluating alleged wage discrimination, none of the three theoretical methods of assessing job "worth" is viable. Market value is relatively precise, but if wage discrimination exists, it may be incorporated in market rates. Job evaluation systems are highly imprecise and, like market rates, may or may not be biased. Marginal productivity cannot be measured at all for most jobs, and even if it could, multiple regression analysis cannot dissect wage discrimination from other sources of residual wage differentials.

Suggestive but fragmentary evidence on the relative importance of job separation and/or individual choice, on the one hand, and wage discrimination, on the other hand, exists in the contrasts among econometric studies that have analyzed wide versus narrow ranges of jobs. At one extreme are studies that encompass a very wide range of jobs, jobs that obviously vary in "worth" by any definition. Such studies invariably find substantial residual wage differentials, and it is a fair inference that much of the residual wage differential are the consequence of job segregation ([f] in Figure 1) and/or individual choice ([d] in

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<sup>117</sup> The rare exceptions are those in which the men and women perform identical work, and in which, therefore, their marginal productivity is known to be the same or nearly the same. As to these situations, see text at notes 119-22 *infra*.

Figure 1).<sup>118</sup> At the other extreme are studies in which only one job ([g'] in Figure 1) or a narrow set of jobs is analyzed, e.g., the study of racial differences in pay of baseball players.<sup>119</sup> It is to such studies that *Wage Discrimination* refers when it speaks of "controlling for occupational affiliation."<sup>120</sup> When the range of jobs is narrowed, *Wage Discrimination* acknowledges, the result is a diminution in "the estimated effects of discrimination."<sup>121</sup> Thus, *Wage Discrimination* admits, "[o]ne's choice of variables, in fact, can eliminate discrimination completely."<sup>122</sup> The elimination of statistical suggestions of discrimination occurs when one focuses on the one situation in which effects of job segregation and individual vocational choice are eliminated, and in which, therefore, any discriminatory residual wage differentials must be due to wage discrimination. That situation is the comparison of men and women doing identical jobs ([g'] in Figure 1). *Wage Discrimination* admits that relatively little discrimination occurs in the context of women and men performing equal work.<sup>123</sup>

The virtual disappearance of residual wage differentials when the effects of job separation are eliminated at first seems strong evidence *against* the existence of substantial wage discrimination. It is possible, however, that employee resistance to the unfairness of unequal pay for identical work discourages wage discrimination when jobs are very similar but not when jobs are dissimilar. Nevertheless, what evidence there is *against* the existence of substantial wage discrimination is important when contrasted with the complete absence of econometric evidence *for* the existence of substantial wage discrimination.<sup>124</sup>

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<sup>118</sup> See, e.g., ECONOMIC DISCRIMINATION, *supra* note 114.

<sup>119</sup> See note 57 *supra*. See also Fuchs, *supra* note 88, at 9.

<sup>120</sup> *Wage Discrimination*, *supra* note 1, at 455 n.220.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 455; accord, J. MADDEN, *supra* note 72, at 92.

<sup>123</sup> *Wage Discrimination*, *supra* note 1, at 454 n.218, quoting Kahne & Kohen, *supra* note 81, at 1261.

<sup>124</sup> In conjunction with the upsurge of feminist activity during the 1970's, economists, and especially feminist economists, greatly elaborated and expanded econometric studies of sex discrimination. The most recent, and by far the most technically developed, collection of such studies appeared too late for citation in *Wage Discrimination*. WOMEN IN THE LABOR MARKET, *supra* note 90. This collection represents the most scientifically advanced analysis ever published on the economics of sex discrimination, yet it in no way disturbs the conclusions of the present article. The conclusions of one of the chapter authors, Chiplin, are typical: "This article has questioned whether the residual [wage differential] approach . . . can provide any guidance to the existence or extent of sex discrimination . . . . [M]any of us might believe that sex discrimination exists, but do we know?" Chiplin, *An Evaluation of Sex Discrimination: Some Problems and a Suggested Re-orientation*, in *id.* at 266-67.

2. *Lack of authority for Wage Discrimination's thesis* — Before the courts or the Congress would act on the premise that jobs done largely by women and blacks are paid less than they are "worth," they would likely require near unanimity among the experts that the problem at least exists.

It is not possible to mobilize such a showing of authoritative opinion. Part I of Professor Blumrosen's article is a compilation of authorities regarding a great many forms of economic and social discrimination against women and blacks, *but not wage discrimination*. If one were to read part I hastily, one could come away with the impression that wage discrimination is an accepted concept and a proven fact, for the article cites many economists on many facets of labor economics. A close reading, however, reveals that none of Professor Blumrosen's authorities is claimed to have proven *or even to have discussed* wage discrimination in the sense that she uses the term. The closest that her authorities come to her concept is in the studies of residual wage differentials, and that is an idea of very much broader scope than wage discrimination.<sup>125</sup>

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<sup>125</sup> See text accompanying notes 86-92 *supra*. The principal economic studies cited in *Wage Discrimination* are those by the distinguished liberal economist, John Galbraith, J. GALBRAITH, *ECONOMICS AND THE PUBLIC PURPOSE* (1973); the present Secretary of Labor, Ray Marshall, *supra* note 81; a recent Secretary of Commerce, J. KREPS, *SEX IN THE MARKETPLACE: AMERICAN WOMEN AT WORK* (1971); and the academicians Lloyd, Sawhill, Oaxaca, Madden, and Kahne & Kohen. Kahne & Kohen, *Economic Perspectives on the Role of Women in the American Economy*, 13 J. ECON. LIT. 1249 (1975); Lloyd, *The Division of Labor Between the Sexes: A Review*, in *SEX, DISCRIMINATION, AND THE DIVISION OF LABOR*, *supra* note 15, at 1; J. MADDEN, *supra* note 72; Oaxaca, *supra* note 81; Sawhill, *supra* note 8. Kreps, Floyd, Sawhill, Madden and Kahne are female. The scope of Professor Blumrosen's authorities is very broad, for four of the works she cites are surveys of the entire literature on discrimination against women in the workplace. See the works of Marshall, Kreps, Oaxaca, and Kahne & Kohen *supra*.

Surprising as it may seem, nowhere in these works does one find even the *idea* of wage discrimination, much less assertions that it exists to a significant degree, or that it exists at all. In a search for scholarly opinion and data on wage discrimination, the present authors have reviewed a number of authorities not cited by Professor Blumrosen. Such opinion and data were notable by their paucity.

We have located only two works by economists which recognize the possibility of wage discrimination. ECONOMIC DISCRIMINATION, *supra* note 114; L. THUROW, *supra* note 113. Writing in the context of race discrimination, Thurow dissects the theoretically conceivable types of invidious economic discrimination into seven categories, one of which is wage discrimination. Although Thurow recognizes wage discrimination as a theoretical possibility, he is hesitant to draw conclusions from his econometric analysis. L. THUROW, *supra* note 113, at 7, 44. As remedies for the seven types of discrimination, in whatever proportions they may occur, Thurow proposes a large number of government interventions, but *not* the direct assault on presumed wage discrimination that Professor Blumrosen proposes. He makes a strong case, instead, for changes in government control of the economy as a whole, or what are commonly referred to as aggregate economic policies:

As a practical policy instrument, creating tighter markets presents several advantages. Aggregate economic policies are impersonal. They can be implemented



It is difficult to find discussions of wage discrimination even if one moves outside the realm of economics. For example, one might expect to find the concept discussed in hearings before the EEOC, but in the hearings cited by *Wage Discrimination*, nearly one thousand pages were devoted to job separation, yet wage discrimination was never mentioned.<sup>126</sup>

3. *Alternatives to the thesis* — No one disputes that residual wage differentials occur. The question is what causes these differences: wage discrimination, other factors, or both? Professor Blumrosen assumes that the role of wage discrimination must be large, but this assumption is unwarranted. The importance of alternative explanations has been amply demonstrated.

a. *The factor of job separation.* None of the parties to the comparable worth controversy argues that all jobs are of equal value. None would dispute that managerial jobs are "worth" more than production jobs, that craft jobs are "worth" more than semiskilled jobs, or that jobs that require extensive specialized training and education are "worth" more than those that do not. Professor Blumrosen has cited many studies that show beyond any doubt that managerial jobs, crafts jobs, and jobs that require extensive specialized training and education are jobs performed mainly by men.<sup>127</sup>

To the extent that this job separation is caused by employer discrimination against women, remedies already exist in Title VII: it is illegal to refuse to hire or promote into high-value jobs because of sex.<sup>128</sup> The comparable worth theory and Professor

without recruiting a bureaucracy of administrators, trainers, teachers and social workers. They do not require state and local cooperation. They do not interfere with personal choice. They can be quickly implemented; they are cheaply implemented; and they can become effective in a short period time.

*Id.* at 64-65. The entire field of the economics of discrimination is in a state of flux and scholarly disagreement. See, e.g., Aigner & Cain, *Statistical Theories of Discrimination in Labor Markets*, 30 INDUS. & LAB. REL. REV. 175 (1977).

<sup>126</sup> *Hearing Before the U.S. Equal Employment Opportunity Commission on Discrimination in White Collar Employment*, 90th Cong., 2d Sess. (1968). (This volume is cited in *Wage Discrimination*, *supra* note 1, at 407 n.40, as the source of a quotation by former EEOC Commissioner Hernandez, but the citation appears to be erroneous, as Hernandez did not testify at the hearing, nor did she submit remarks for the record.).

<sup>127</sup> *Wage Discrimination*, *supra* note 1, at nn.3, 9, 10, 11, 17, 21, 26, 28, 29-39, 57, 61, 62, 65, 84-88, 194, 196, 198, & 215.

<sup>128</sup> Of course, not all job separation is the result of discrimination by employers. Parents, schools, and our society in general discriminate very strongly, producing among women and men quite different ideas as to the vocations they can and should select. This phenomenon is called sex role differentiation or sex typing. Fuchs, *Women's Earnings: Recent Trends and Long-Run Prospects*, MONTHLY LAB. REV., May 1979, at 23; J. GALBRAITH, *supra* note 125, at 37; J. KREPS, *supra* note 125, at 42-46; E. MACCOBY & C. JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* 277-348 (1974); Sawhill, *supra* note 125, at 391-94; Stephenson, *Relative Wages and Sex Segregation by Occupation*, in SEX, DISCRIMINA-

Blumrosen's proposed remedies would do nothing to end job separation. In fact, her proposed pay raises for "women's" jobs would tend to perpetuate job separation by eliminating major incentives for women to seek non-traditional jobs.<sup>129</sup>

b. *The factor of "job crowding."* Job separation is most likely the consequence both of sex role differentiation<sup>130</sup> and job segregation. Regardless of the cause, the result is "crowding" of women into a restricted spectrum of jobs and a concomitant decrease in the market value of their services.<sup>131</sup> Technically, the crowding theory proposes that wage differentials occur because members of a group are excluded (or exclude themselves) from some occupations, hence are "crowded" into others. To the extent that wages are elastic with respect to the number of applicants, wages are depressed in the crowded occupations.<sup>132</sup> This situation can be alleviated by opening up all jobs to both sexes, i.e., by enforcement of Title VII as Congress intended.<sup>133</sup> Court-mandated pay raises would exacerbate crowding, not alleviate it.

### C. *Failure to Demonstrate Wage Discrimination*

Part A of this section showed that the facts and the analysis of Professor Blumrosen's article were insufficient to make a case that wage discrimination is an important phenomenon. Part B

TION, AND THE DIVISION OF LABOR, *supra* note 15, at 175, 197. *But see* R. KANTER, MEN AND WOMEN OF THE CORPORATION 260-64 (1977) (sex role differentiation far from complete explanation of job separation).

<sup>129</sup> Pay raises for "women's" jobs would make those jobs more attractive to men as well as women, and some integration of "women's" jobs might result. However, the entry of men into "women's" jobs would produce no reciprocal incentive for women to seek "men's" jobs.

<sup>130</sup> *See* note 128 *supra*.

<sup>131</sup> The economist and former Secretary of Commerce Juanita Kreps expressed the consensus of scholars when she wrote:

[T]he concentration of women in the accepted female occupations of elementary teaching, nursing, clerical and service-type jobs would seem . . . to indicate some reluctance on the part of women to venture into men's occupational territory, or some reluctance on the part of employers to offer men and women wider job options, probably both.

J. KREPS, *supra* note 125, at 36. Professor Kreps further states:

If women would make economic gains, they need to realize that market forces do have an impact, and that they cannot continue to offer an excess supply of a particular talent such as elementary school teaching, and yet expect the salary for that job to keep pace with that in professions which are understaffed.

*Id.* at 106-07.

<sup>132</sup> Bergmann, *The Effect on White Incomes of Discrimination in Employment*, 79 J. POL. ECON. 294 (1971); Johnson & Stafford, *Women and the Academic Labor Market*, in SEX, DISCRIMINATION, AND THE DIVISION OF LABOR, *supra* note 15, at 201, 212; Stephenson, *supra* note 128, at 175.

<sup>133</sup> *See* part II *infra*.

showed that the factual thesis of *Wage Discrimination* is mistaken in its logic and unsupported by expert authority. Moreover, well-established alternative explanations account for much, if not all, of the wage differentials that Professor Blumrosen attributes to wage discrimination. Before the law can attempt to act on wage discrimination, the phenomenon must be defined, demonstrated, and measured with a great deal more precision than now seems possible.

## II. TITLE VII AND RESIDUAL WAGE DIFFERENTIALS

A number of substantial legal problems bar the adoption of the job separation-cum-wage discrimination theory outlined by Professor Blumrosen. The first of these legal difficulties is the fact that the legislative history of the pertinent statutes is inconsistent with the interpretation that her article would place on them. If the EEOC and the courts adopt the Blumrosen theory, a major restructuring of the American economy will likely result.<sup>134</sup> It is implausible that Congress intended such an upheaval in wage structures when it enacted Title VII of the Civil Rights Act of 1964 and the amendments to Title VII in 1972 without

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<sup>134</sup> It is hard to overstate the potential dollar impact of the Blumrosen theory upon the American economy. Statistics cited by Professor Blumrosen indicate that the average earnings of full-time women workers are less than sixty percent of the average for full-time working men. *Wage Discrimination*, *supra* note 1, at 410. It is her contention that "[f]rom 20% to 50% of the wage differential between men and women has been attributed to factors which cannot be justified on grounds unrelated to discrimination." *Id.* at 497. Finally, she states that "most women work in 'women's jobs'" and that a substantial number of women work in jobs that are more than seventy percent female-intensive. *Id.* at 405-06. Given this battery of statistics, it is clear that a broad scale application of Professor Blumrosen's theory would require a vast sum of money to achieve true pay parity across the spectrum of jobs in the American work force covered by Title VII. It was estimated in 1978 that "to raise the aggregate pay of the country's 27.3 million full-time working women high enough so that the median pay for women would equal that of men would add a staggering \$150 billion a year to civilian payrolls." Smith, *The EEOC's Bold Foray Into Job Evaluation*, *FORTUNE*, Sept. 11, 1978, at 58-59. Congress could not have intended this cataclysmic impact on the American economy, since it made no reference to such a result in the legislative history underlying Title VII. The gravest consequences would inexorably flow from such a drastic imposition of liability upon employers: competition between companies would become dependent largely on pay parity factors extraneous to normal market concerns; American companies would have less ability to compete in the international market, with a corresponding increase in the balance of payments deficit; collective bargaining relations between employers and unions would become unsettled if artificial pay levels were imposed for compensation of women in unorganized occupations; and the costs of goods and services would undoubtedly increase, thus further fueling the inflationary spiral. In short, Professor Blumrosen's theory, like the equal value approach rejected in *Lemons v. City & County of Denver*, 17 Fair Empl. Prac. Cas. 906 (D. Colo. 1978), *aff'd*, *DAILY LAB. REP. (BNA)*, No. 81, at D-1 (10th Cir. April 24, 1980), is "pregnant with the possibility of disrupting the entire economic system of the United States of America." *Id.* at 907.

any substantial legislative debate on that subject. This implausibility is magnified when one considers that the EPA, a statute specifically addressed to remedying sex-based wage discrimination, is based in great part upon a legislative history that sharply limits federal intrusion into wage structures. The argument that Title VII may be invoked to equalize wage differentials is further attenuated by the Bennett Amendment,<sup>135</sup> a statutory provision which ties Title VII sex-based compensation claims to the "equal work" standard of the EPA.

*A. Congressional Intent and the "Equal Work" Standard*

1. *The EPA* — It is important to recall that both the EPA and the Civil Rights Act of 1964, of which Title VII is a part, were passed by consecutive sessions of the Eighty-eighth Congress. In every Congress since 1945, bills had been introduced regarding pay parity for women.<sup>136</sup> The Eighty-eighth Congress drew upon this background and took great pains to delineate the standard under which sex-based compensation claims would be examined under the EPA. Congress concluded that governmental intervention to equalize wage differentials was to be undertaken only within one set of circumstances: when men's and women's jobs were identical or nearly so, hence unarguably of equal worth. In order to sustain the Blumrosen theory, one must believe that the same legislators who had so carefully circumscribed legal intervention into compensation practices under the EPA threw those restrictions to the winds one year later, during the passage of Title VII, without any significant debate.

The legislative history of the EPA demonstrates the caution that Congress expressed in adopting a wage discrimination standard. The debates showed overriding Congressional concern that the EPA not be invoked by the government to mandate equality of pay for jobs of different content and, concomitantly, a concern that the latitude of administrators and courts in enforcing the EPA be clearly circumscribed by the equal work wage discrimination standard.<sup>137</sup> "What we seek to ensure," Representative Frelinghuysen explained, is "where men and women are doing the same job under the same working conditions that they will

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<sup>135</sup> 42 U.S.C. § 2000e-2(h) (1976).

<sup>136</sup> See e.g., Gitt & Gelb, *Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII*, 8 Loy. U.L.J. (Chicago) 723, 734-42 (1977).

<sup>137</sup> 108 CONG. REC. 14747 (1962) (remarks of Rep. St. George); *id.* at 14768 (1962) (remarks of Rep. Landrum).

receive the same pay."<sup>138</sup> He continued:

[T]he jobs in dispute must be the same in *work content*, effort, skill, and responsibility requirements, and in working conditions. . . . [The EPA] is not intended to compare unrelated jobs, or jobs that have been historically and normally considered by the industry to be different. Violations usually will be apparent, and will almost always occur in the same work area and where the same tasks are performed.<sup>139</sup>

Representative Goodell, who sponsored the bill that became the EPA, echoed Representative Frelinghuysen's comments. He noted that the bill as originally introduced had used the term "comparable work" rather than "equal work."<sup>140</sup> The former term, as Professor Blumrosen points out,<sup>141</sup> had a well-established connotation. During World War II, the regulations of the National War Labor Board (NWLB) required equal pay for "comparable work." Under these regulations, the Board had made job evaluations to determine whether pay inequities existed within a plant between dissimilar jobs.<sup>142</sup> In substituting the term "equal work" for "comparable work," Congress rejected the approach taken by the NWLB. Representative Goodell stressed the significance of adopting an "equal work" standard:

I think it is important that we have clear legislative history at this point. Last year when the House changed the word "comparable" to "equal" the clear intention was to narrow the whole concept. We went from "comparable" to "equal" meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.

We do not expect the Labor Department to go into an establishment and attempt to rate jobs that are not

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<sup>138</sup> 109 CONG. REC. 9196 (1963) (remarks of Rep. Frelinghuysen) (emphasis supplied).

<sup>139</sup> *Id.*

<sup>140</sup> 109 CONG. REC. 9197 (1963).

<sup>141</sup> *Wage Discrimination*, *supra* note 1, at 475.

<sup>142</sup> See *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164 (3d Cir. 1977); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

It should be noted that the NWLB was not a judicial tribunal in any sense. It was a tripartite body made up of public, industry, and labor representatives which had the authority to resolve disputes only by mediation or arbitration. Its recommendations did not have the force and effect of law, nor were they enforceable by court order. See National War Labor Board, *Termination Report*, Vol. I, pp. XXV-XXVI, 7, 10 (1945).

equal. We do not want to hear the Department say, "Well, they amount to the same thing," and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal.<sup>143</sup>

Representative Goodell emphasized that the prime reason Congress had adopted the equal work standard in the EPA was to insure that employers would "have a maximum degree of discretion" in working out how much employees should be paid.<sup>144</sup> Professor Blumrosen's article glosses over the legislative history of the EPA, though it does note that the assumption "that Congress carefully drafted the EPA so that it would apply only to a narrow set of circumstances" has "considerable validity."<sup>145</sup>

2. *Title VII of the Civil Rights Act of 1964* — The care with which Congress limited intervention into alleged wage discrimination based upon sex in the EPA contrasts sharply with its cursory treatment of the entire subject of sex discrimination during the passage of Title VII. In fact, the legislative history of the sex discrimination provision of Title VII is almost nonexistent.<sup>146</sup>

The House bill<sup>147</sup> that was ultimately enacted as the Civil Rights Act of 1964 was intended primarily to secure the rights of blacks. The bill went to the House floor for debate without any consideration of a sex discrimination prohibition.<sup>148</sup> Debate on the House floor lasted almost two weeks, from January 31, to

<sup>143</sup> 109 CONG. REC. 9197 (1963) (remarks of Rep. Goodell). Representative Goodell's remarks as a sponsor of the legislation are entitled to great weight. See *NLRB v. National Woodwork Mfr's Ass'n*, 386 U.S. 612, 629-31 (1967).

A dialogue between Representative Goodell and Representative Griffin further explained the concept of equal job content:

Mr. GOODELL: We are talking about jobs that involve the same quality, the same size, the same number, where they do the same type of thing, with an identity to them.

Mr. GRIFFIN: In addition, it would be clear that in comparing inspectors, if one inspects a complicated part of an engine, for example, while another inspector makes only a cursory type of inspection, obviously, the fact that both are inspectors would not mean they should necessarily receive equal pay.

Mr. GOODELL: I agree with the gentleman.

109 CONG. REC. at 9198.

<sup>144</sup> *Id.* (remarks of Rep. Goodell).

<sup>145</sup> *Wage Discrimination*, *supra* note 1, at 475.

<sup>146</sup> The legislative history of Title VII's sex discrimination provision is "notable primarily for its brevity." *General Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976). See also *Wage Discrimination*, *supra* note 1, at 477-81.

<sup>147</sup> H.R. REP. NO. 7152, 88th Cong., 2d Sess. (1964).

<sup>148</sup> Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 *HAST. L.J.* 305, 310 (1968); Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 *MINN. L. REV.* 877, 880 (1967).

February 10, 1964. It was not until the final day that an amendment to prohibit sex discrimination was proposed as an attempt to thwart passage of the bill.<sup>149</sup> The amendment was passed by the House that same day, and the entire bill was approved two days later and sent to the Senate without any consideration of the effect of the amendment on the EPA.

The bill bypassed the Senate committee system and was presented to the full Senate for initial consideration. It was not until this time that concern was expressed about the relation of the Title VII sex discrimination ban to the EPA. In response, Senator Clark submitted a statement to the Senate which assured that "[t]he standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII."<sup>150</sup> Apparently not completely satisfied with this explanation, Senator Bennett proposed an amendment to section 703(h). The proffered amendment was passed with very little debate, but Senator Bennett clearly stated that "[t]he purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified."<sup>151</sup>

During consideration by the House of the Senate amendments to the House bill, Congressman Celler was called upon to explain the purpose of the Bennett Amendment. He stated that the Bennett Amendment "provides that compliance with the Fair Labor Standards Act as amended [*i.e.*, the EPA] satisfies the requirements of the title [Title VII] banning discrimination because of sex."<sup>152</sup>

The rather barren legislative history of the sex discrimination provisions of Title VII evidences no intent by Congress to abandon the meticulously crafted, thoroughly debated limitations of the EPA, adopted by the same Congress one year earlier. To the contrary, the legislative history of the Bennett Amendment shows Congressional reluctance to extend governmental regulation of wage differentials beyond the equal work standard of the

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<sup>149</sup> Representative Howard Smith of Virginia, Chairman of the House Rules Committee and a powerful opponent of Title VII and of all civil rights legislation, proposed the amendment. For a discussion of Judge Smith's motives in proposing to amend Section 703(a) to prohibit sex discrimination, see Miller, *supra* note 148, at 880; Kanowitz, *supra* note 148, at 310-13; Note, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 So. CAL. L. REV. 965, 968 (1973).

<sup>150</sup> 110 CONG. REC. 7217 (1964). For further discussion of Senator Clark's memorandum, see text accompanying note 162 *infra*.

<sup>151</sup> 110 CONG. REC. 13647 (1964).

<sup>152</sup> *Id.* at 15896 (1964).

EPA.<sup>153</sup> Thus, Professor Blumrosen's assertion that Title VII's prohibition of job segregation affects wage differentials between different jobs finds no support in the legislative history of Title VII.

Moreover, Professor Blumrosen's comparable worth theory ignores one of the fundamental policies of the EPA, often expressed in the legislative history of that statute, that federal intervention in wage setting must not extend beyond equal work situations. It should be added that a policy of limited governmental intrusion was operative in the enactment of Title VII as well, as was recently expressed by the Supreme Court in *United Steelworkers of America v. Weber*:<sup>154</sup> "Title VII could not have

<sup>153</sup> The complete history of the Bennett Amendment is set forth below:

Mr. BENNETT. Mr. President, I yield myself 2 minutes. . . .

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

On page 44, line 15, immediately after the period, it is proposed to insert the following new sentence: "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

Mr. BENNETT. Mr. President, after many years of yearning by members of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.

By this time, programs have been established for the effective administration of this act. Now, when the civil rights bill is under consideration, in which the word 'sex' has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act.

The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.

I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill. If they will confirm that understand [sic], I shall ask that the amendment be voted on without asking for the yeas and nays.

Mr. HUMPHREY. The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.

Mr. DIRKSEN. Mr. President, I yield myself 1 minute.

We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions.

All that the pending amendment does is recognize those exceptions, that are carried in the basic act.

Therefore, this amendment is necessary, in the interest of clarification.

The PRESIDING OFFICER. (Mr. RIBICOFF in the chair). The question is on agreeing to the amendment of the Senator from Utah. (Putting the question.)

The amendment was agreed to.

*Id.* at 13647.

<sup>154</sup> — U.S. —, 99 S.Ct. 2721 (1979).



been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that "management prerogatives and union freedoms . . . be left undisturbed to the greatest extent possible."<sup>155</sup> This policy of restricted federal intervention into the wage practices of employers would be eviscerated by the remedial approach proposed in *Wage Discrimination*. Virtually all employers and workers, and their families, would experience changes in their real incomes if the *Wage Discrimination* theory became the law.

Even if Title VII were susceptible to a broader interpretation than the EPA as regards sex-linked wage discrimination, the earlier statute should still control. Because the EPA is a specific law regulating a particular area of congressional concern, sex-based wage discrimination, it must prevail over a later statute, Title VII, of general application to the same subject area.<sup>156</sup> Under this well-established rule of statutory construction, and in view of the legislative record of the two statutes dealing with sex discrimination passed by the Eighty-eighth Congress, federal efforts to review wage discrimination claims, by whatever theoretical underpinnings, are governed by the EPA. This conclusion is further supported by the statutory provision through which Congress linked Title VII to the EPA, the Bennett Amendment.

### *B. The Blumrosen Theory and the Bennett Amendment*

1. *The Bennett Amendment* — The Bennett Amendment to Title VII states that it is not illegal for an employer to differentiate in compensation on the basis of sex "if such differentiation is authorized by the provisions of the [EPA]."<sup>157</sup> Professor Blum-

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<sup>155</sup> *Id.* at 2730 (citation omitted). For the pertinent legislative history, see H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 2, at 29 (1963).

<sup>156</sup> See, e.g., *Morton v. Mancari*, 417 U.S. 535 (1974), where the Court held that Title VII's race discrimination provision did not preclude enforcement of an earlier statute giving hiring preference to Indians and stated: "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Id.* at 550-51. Accord, *Radzanower v. Touche-Ross & Co.*, 426 U.S. 148, 153 (1976) ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."); *Brown v. General Servs. Admin.*, 425 U.S. 820, 834 (1976) ("[A] precisely drawn, detailed statute pre-empts more general remedies.").

<sup>157</sup> The Bennett Amendment provides:

It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such

rosen concludes that the Bennett Amendment incorporates only the EPA's four affirmative defenses<sup>158</sup> into Title VII but does *not* also impose the EPA's "equal work" standard upon Title VII as the sole basis for sex-based compensation claims. In reaching this conclusion, she overlooks both the language of Section 703(h) and significant legislative history of Title VII and the EPA, and she misapprehends relevant court decisions.

2. *The effect of section 703(h) on the purpose of the Bennett Amendment* — The EPA contains four statutory exceptions or defenses. But Title VII's section 703(h), which the Supreme Court has recognized as a "definitional provision,"<sup>159</sup> already contained those defenses when Senator Bennett offered his "technical correction."<sup>160</sup> The opening sentence of section 703(h) protected differentials in compensation based on seniority, merit, or quantity or quality of production. These were three of the four EPA defenses. The fourth EPA defense, "a factor other than sex," was already implicit in Title VII because the statute's prohibition of sex discrimination applies only if there is discrimination on the basis of sex. Thus, Professor Blumrosen's assertion that the purpose of the Bennett Amendment was to incorporate the EPA defenses is unpersuasive. The four defenses were already available under Title VII when Senator Bennett proposed his amendment. Under such an interpretation the amendment would be mere surplusage.

3. *Applicability of the EPA standard to sex-based wage claims under Title VII* — *Wage Discrimination's* discussion of the Bennett Amendment is sparse and selective, especially in its use of legislative history surrounding that provision. The article

*differentiation is authorized by the provisions of Section 206(d) of Title 29 [Fair Labor Standards Act of 1938 (codified at 29 U.S.C. § 206(d))].*

42 U.S.C. § 2000e-2(h) (1976) (emphasis added).

<sup>158</sup> The Equal Pay Act's four affirmative defenses permit different compensation if the differential is made by way of (a) a seniority system, (b) a merit system, (c) a system which measures earnings by quantity or quality of production, or (d) a differential based on any other factor than sex. 29 U.S.C. § 206(d)(1) (1976).

<sup>159</sup> See, e.g., *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 346-47 (1977); *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 758 (1976).

<sup>160</sup> The first clause of § 703(h) states:

(h) Notwithstanding any other provision of this subchapter, *it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .*

42 U.S.C. § 2000e-2(h) (1976) (emphasis added).

also overlooks other legislative statements, made during consideration of Title VII, which recognized the potential conflict between Title VII and the EPA and which resolved that conflict in favor of the EPA's standards.

a. *Senator Bennett's written interpretation.* In the 1965 congressional session following passage of the Civil Rights Act, Senator Bennett read into the Congressional Record his interpretation of the amendment to section 703(h) that he had sponsored the previous year.<sup>161</sup> The Senator expressed his concern because a law review article had asserted, as does Professor Blumrosen, that there were two possible interpretations of the amendment.<sup>162</sup> Senator Bennett noted that the article suggested the possibility that the amendment merely incorporated into Title VII the EPA's affirmative defenses, and stated that: "[The language setting out the defenses] is merely clarifying language similar to that which was already in section 703(h). If the Bennett Amendment was simply intended to incorporate by reference these exceptions into subsection (h), the amendment would have no substantive effect."<sup>163</sup>

The author of the law review article had noted the "more plausible" interpretation to be that, if the amendment is to be given any effect, "it must be interpreted to mean that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act."<sup>164</sup> In order to resolve the matter, Senator Bennett offered his written interpretation:

The amendment therefore means that it is not an unlawful employment practice: . . . (b) to have different standards of compensation for nonexempt employees, where such differentiation is not prohibited by the equal pay amendment to the Fair Labor Standards Act.

Simply stated, *the [Bennett] amendment means that discrimination in compensation on account of sex does not violate title VII unless it also violates the Equal Pay Act.*<sup>165</sup>

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<sup>161</sup> 111 CONG. REC. 13359-13360 (1965).

<sup>162</sup> Indeed, Professor Blumrosen posits three possible interpretations of the Bennett Amendment. *Wage Discrimination*, *supra* note 1, at 481-82. The law review article referred to in 111 CONG. REC. 13359 (1965) is Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62 (1964).

<sup>163</sup> 111 CONG. REC. 13359 (1965).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* (emphasis added). Senator Dirksen agreed that this interpretation was the one that he, Senator Humphrey, and their staffs had in mind when the Senate adopted the

b. *The Clark memorandum.* Following House passage of the bill which became the Civil Rights Act of 1964, including the sex discrimination provision, and after the bill had been debated for three weeks in the Senate, Senator Clark, one of the bill's floor managers, prepared a memorandum which was read into the Congressional Record to answer questions and respond to objections that had been raised concerning the meaning of Title VII. One of these explanations, memorializing a colloquy between Senators Dirksen and Clark, clearly states that Congress intended to preserve EPA standards under the Civil Rights bill:

*Objection:* The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitations in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.

*Answer:* The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike title VII. Furthermore, under Title VII, jobs can no longer be classified as to sex, except where there is a rational basis for discrimination on the ground of bona fide occupational qualification. *The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII.*<sup>166</sup>

Professor Blumrosen cites this passage of the Clark memorandum as evidence that Congress recognized that the EPA does not cover most single-sex jobs.<sup>167</sup> As far as it goes, one cannot quarrel with her deduction. Clearly, however, the memorandum also demonstrates a congressional intent to treat job segregation and wage discrimination as separate problems. With respect to Title VII's proscription of "discrimination as to wages," Congress intended that Title VII not go beyond the limits of the EPA. Moreover, Senator Clark's explanation cannot be restricted, as Professor Blumrosen has argued, to mean that the EPA equal work standard would apply to Title VII only when conduct that would violate the EPA also was alleged to violate Title VII. The Clark

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Bennett Amendment. *Id.* at 13360 (1965). He added: "I trust that that will suffice to clear up in the minds of anyone, whether in the Department of Justice or elsewhere, what the Senate intended when that amendment was accepted." *Id.*

<sup>166</sup> 110 CONG. REC. 7217 (1964) (emphasis added).

<sup>167</sup> *Wage Discrimination*, *supra* note 1, at 478.

memorandum plainly expressed the concern that Title VII might be construed as prohibiting unequal pay when different jobs were involved. Senator Clark's reply indicates that when different jobs were at issue, the EPA's legal standards would apply to limit the reach of Title VII. This limitation would be rendered meaningless if the *Wage Discrimination* theory were adopted and a prima facie case of wage discrimination could be made out on the mere showing that a plaintiff occupied a job traditionally held by women.

c. *The Celler statement.* After the Senate added amendments to the Civil Rights Act of 1964, including the Bennett Amendment, it returned the bill to the House. *Wage Discrimination* fails to note that during these House deliberations, Representative Celler, the bill's original sponsor and floor leader in the House, set out in the record the understanding of the House that sex-based compensation claims would not satisfy Title VII unless they met the EPA's standards. He stated that the Bennett Amendment: "[p]rovides that *compliance* with the EPA satisfies the requirement of the title barring discrimination because of sex — Section [703(h)]."<sup>168</sup> Representative Celler's statement that compliance with the EPA satisfies the requirements of Title VII recognized, as have the courts,<sup>169</sup> that differences in compensation that do not violate the EPA are "authorized" by the Bennett Amendment for purposes of Title VII.

d. *The contemporaneous administrative interpretation.* Consistent with Representative Celler's and Senator Bennett's interpretation of section 703(h), and Senator Clark's explanation of the intended interaction between Title VII and the EPA in the area of sex-linked wage discrimination, is the EEOC's contemporaneous interpretation of the amendment, published in 1965. The Commission stated at that time that:

(a) Title VII requires that its provisions be harmonized with the Equal Pay Act . . . in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets Section 703(h) to mean that the standards of "equal pay for equal work" set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII.<sup>170</sup>

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<sup>168</sup> 110 CONG. REC. 15896 (1964) (emphasis added).

<sup>169</sup> See text accompanying notes 175-77 *infra*.

<sup>170</sup> 29 C.F.R. § 1604.7 (1965) (emphasis added).

Although the 1965 EEOC interpretation of the impact of the Bennett Amendment was dropped in 1972, when the agency issued a new interpretation that the Bennett Amendment's purpose was only to incorporate the EPA's defenses in Title VII wage suits,<sup>171</sup> the Supreme Court has stated on several occasions that EEOC interpretations and guidelines which were promulgated contemporaneously with the enactment of Title VII should be accorded more weight than those issued in later years.<sup>172</sup>

Thus congressional history, even as interpreted by the EEOC in 1965, provides no support for the theory asserted in *Wage Discrimination* that the federal courts can be thrust into a massive reorganization of the American economy. Among Congress' reasons for adopting the "equal work" concept, in both Title VII and the EPA, were that it was less vague than the "comparable work" approach and that it would not inject federal regulators and the courts into these areas.<sup>173</sup>

4. *The case law* — Nearly every court that has addressed the issue has held that Title VII wage discrimination claims are co-terminous with EPA claims. The "equal work" standard has been followed, as a limitation upon wage discrimination claims under Title VII, by the Supreme Court<sup>174</sup> and by seven federal

<sup>171</sup> In 1972, the EEOC changed its interpretation to eliminate the language of the 1965 interpretation and substitute the following:

(a) The employee coverage of the prohibitions against discrimination based on sex contained in title VII is co-extensive with that of the other prohibitions contained in title VII and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) *By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under title VII.*

(c) Where such a defense is raised the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, but will not be bound thereby.

29 C.F.R. § 1604.8 (1979) (emphasis added).

<sup>172</sup> See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 76 n.11 (1977); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 142-45 (1976). It is likely that the courts will continue to give little weight to the 1972 EEOC guideline in wage comparability cases. As the Court noted in *Trans World Airlines, Inc.*, "[A]n EEOC guideline is not entitled to great weight where . . . it varies from prior EEOC policy and no new legislative history has been introduced in support of the change." 432 U.S. at 76 n.11.

<sup>173</sup> See text accompanying notes 142-43 *supra*.

<sup>174</sup> *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). In *Gilbert* the Court held that an employer's exclusion of benefits for disability during pregnancy was not a violation of Title VII. One of the Court's grounds for its decision was a recognition that conduct that would otherwise violate § 703(a) of Title VII was protected by the Bennett Amendment because the conduct did not violate the EPA's prohibitions. *Id.* at 144-45.

The 1978 pregnancy disability amendment to Title VII amended § 701(k), 42 U.S.C. § 2000e-2(k), to state that discrimination because of sex would include the failure to pay female employees maternity-related disability payments. Significantly, the amendment also provided that "nothing in section 703(h) of this title shall be interpreted to permit otherwise." As the House report stated:

courts of appeals,<sup>175</sup> as well as by numerous trial courts.<sup>176</sup> These

This disclaimer was necessitated by the Supreme Court's reliance in the *Gilbert* case on Section 703(h) of Title VII ("the Bennett Amendment") which in effect provides that certain practices authorized by the [EPA] do not violate Title VII. The Court in *Gilbert* noted that a regulation issued under the Equal Pay Act [by the Wage and Hour Administration] provides that certain gender-based differentiations do not violate the [EPA] . . . . While the *Gilbert* opinion is somewhat vague as to the pertinence of this regulation, it does appear that the Court regarded the Bennett amendment and the Equal Pay Act regulation, taken together, as somehow insulating pregnancy-based classifications from the proscriptions of Title VII.

Therefore, the committee determined that it was necessary to expressly remove the Bennett amendment from the pregnancy issue in order to assure the equal treatment of pregnant workers.

H.R. REP. NO. 95-948, 95th Cong., 2d Sess. 7 (1978), reprinted in [1978] U.S. CODE CONG. & ADMIN. NEWS 4749, 4755.

<sup>175</sup> *Lemons v. City & County of Denver*, DAILY LAB. REP. (BNA), No. 81, at D-1 (10th Cir. April 24, 1980); *Marshall v. Dallas Independent School Dist.*, 21 Fair Empl. Prac. Cas. 143 (5th Cir. 1979); *DiSalvo v. Chamber of Commerce*, 568 F.2d 593 (8th Cir. 1978); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); *Calage v. University of Tennessee*, 544 F.2d 297 (6th Cir. 1976); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977); *Orr v. Frank R. McNeill & Son, Inc.*, 511 F.2d 166 (5th Cir.) *cert. denied*, 423 U.S. 856 (1975); *Ammons v. Zia Co.*, 448 F.2d 117 (10th Cir. 1971); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970).

*But see* *Gunther v. County of Washington*, 602 F.2d 882 (9th Cir. 1979). Although plaintiffs in *Gunther* were allowed to proceed under a Title VII wage discrimination theory, the court stated that absent a showing of "equal work" the burden of proof still remained on the plaintiffs to show on remand that "some of the discrepancy in wages was due to sex discrimination." *Id.* at 888.

Cases such as *Los Angeles Dep't of Power & Water v. Manhart*, 435 U.S. 702 (1978), and *Laffey v. Northwest Air Lines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978), relied upon by Professor Blumrosen to support the position that the Bennett Amendment is not a barrier to a broad application of Title VII to remedy residual wage differentials, are inapposite. In *Manhart*, the Supreme Court was concerned only with defining the "factor other than sex" defense of the EPA. In that case, male and female employees were "identically situated," *Manhart v. Los Angeles Dep't of Power & Water*, 553 F.2d 581, 583 (9th Cir. 1976), so the Supreme Court was not confronted with the issue that Professor Blumrosen raises, *viz.*, whether a Title VII wage discrimination claim is broader than the EPA. Similarly, in *Laffey* the actual jobs being compared were substantially equal (stewardesses and pursers). The Court of Appeals for the District of Columbia emphasized that Title VII was not intended to supplant the EPA in cases involving sex-based wage discrimination claims, stating:

Although Title VII reaches farther than the Equal Pay Act to protect groups other than those sex-based classes and to proscribe discrimination in many facets of employment additional to compensation, nowhere have we encountered an indication that Title VII was intended either to supplant or be supplanted by the Equal Pay Act in the relatively small area in which the two are congruent. On the contrary, we are satisfied that the provisions of both acts should be read *in pari materia*, and neither should be interpreted in a manner that would undermine the other. In *Orr v. Frank R. McNeill & Son, Inc.*, the Fifth Circuit declared that "[t]he sex discrimination provision of Title VII of the Civil Rights Act of 1964 must be construed in harmony with the Equal Pay Act of 1963." We agree, and we now so hold.

567 F.2d at 445-46 (footnote omitted).

<sup>176</sup> *EEOC v. Ball Corp.*, Case No. C76-31 (N.D. Ohio 1979); *Marshall v. A&M Consolidated School Dist.*, 21 Fair Empl. Prac. Cas. 134 (S.D. Tex. 1979); *Johnson v. University*

courts have ruled that Title VII and the EPA must be construed *in pari materia*. Although Congress limited the scope of sex-based compensation claims in the EPA, it guaranteed women equal access to jobs in Title VII by forbidding discrimination in hiring, job placement or classification, promotions, transfers, layoffs, and discharges.<sup>177</sup> The two statutes provide a balanced approach to sex discrimination, setting forth a scheme that guarantees qualified female employees access to all jobs while, at the same time, assuring that the courts and federal agencies will not become entangled in setting wage rates.

The theory that Title VII overrides the EPA would entangle the courts in a hopeless morass of wage claim litigation. The judicial entanglement would be exacerbated by the fact that labor law has left the substance of collective bargaining to the parties and not the government,<sup>178</sup> and so the courts have had little experience in setting wage rates. It should also be noted that al-

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of Bridgeport, 20 Fair Empl. Prac. Cas. 1766, 1769-70 (D. Conn. 1979); *IUE v. Westinghouse Elec. Corp.*, 19 Fair Empl. Prac. Cas. 450 (D.N.J. 1979), *appeal pending*, Nos. 79-1893 & 1894 (3d Cir.); *Kohne v. Imco Container Co.*, 20 Empl. Prac. Dec. ¶ 30,168 (W.D. Va. 1979); *Lemons v. City & County of Denver*, 17 Fair Empl. Prac. Cas. 906 (D. Colo. 1978), *aff'd*, DAILY LAB. REP. (BNA), No. 81, at D-1 (10th Cir. April 24, 1980); *Wetzel v. Liberty Mutual Ins. Co.*, 449 F. Supp. 397, 407 (W.D. Pa. 1978); *IUE v. Westinghouse Elec. Corp.*, 17 Fair Empl. Prac. Cas. 16 (N.D. W. Va. 1977); *Molthan v. Temple Univ.*, 420 F. Supp. 448 (E.D. Pa. 1977); *Chrapliwy v. Uniroyal, Inc.*, 15 Fair Empl. Prac. Cas. 795 (N.D. Ind. 1977); *Patterson v. Western Development Labs*, 13 Fair Empl. Prac. Cas. 772, 775-76 (N.D. Cal. 1976).

<sup>177</sup> The general policy considerations for regarding the EPA and Title VII *in pari materia* are cogently summarized by the court in *Kohne v. Imco Container Co.*, 20 Empl. Prac. Dec. ¶ 30,168 (W.D. Va. 1979), as follows:

Of course, sound policy underlies such a construction. Congress did not intend to put either the Secretary of Labor or the courts in the business of evaluating jobs and in determining what constitutes a proper differential for unequal work . . . . Sufficient remedies exist under Title VII to deal with discriminatory hiring and promotional practices, without the courts becoming embroiled in determinations of how an employer's work force ought to be paid.

*Id.* at 11,876 (citations omitted).

<sup>178</sup> See *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). In *Porter*, the Court held that the National Labor Relations Board had exceeded its remedial powers by ordering the employer to grant to the union a contract clause providing for checkoff of union dues. The Court stated:

The Board's remedial powers under § 10 of the Act [29 U.S.C. § 160] are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based — private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

*Id.* at 108 (emphasis added). Under the *Wage Discrimination* theory, the government would seek judicially mandated wage rates for most female workers in the economy, a momentous step from "governmental supervision of procedure alone" amounting to "official compulsion" of substantive contractual provisions.



though Congress adopted the "equal work" approach in the EPA because it was narrower and less vague than other alternatives, "the federal courts have had no small difficulty" in attempting to apply even this standard.<sup>179</sup> The adoption of the *Wage Discrimination* theory would make the federal courts' responsibility even more extensive and place upon the judicial system a significant burden not intended by Congress. In the words of Mr. Justice Rehnquist, in the recent case of *Furnco Construction Corp. v. Waters*:<sup>180</sup> "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."

### III. THE *Wage Discrimination* THEORY AND STANDARDS OF PROOF

With respect to standards of proof, Professor Blumrosen's theory contains two fatal defects. The first defect is in the creation and the operation of the theory's "triggering mechanism," a presumption of wage discrimination which is established merely by showing that a plaintiff works in a job traditionally performed by women. The second defect is that the proposed method of proof contravenes the established methods of proof under Title VII as to the construction of a *prima facie* case and as to the available defenses.

#### A. *An Examination of the Wage Discrimination Presumption*

All proponents of the comparable worth movement agree that the law ought to prohibit wage discrimination. Professor Blumrosen goes beyond others in her unique proposal for the method of proof. She implicitly recognizes the difficulty — or impossibility — of demonstrating wage discrimination in any particular instance. To enable the plaintiffs to recover, she proposes that they *not be required* to prove wage discrimination. She argues that the plaintiffs need only show that they work in a job that is or was predominantly female. In such jobs wage discrimination is so nearly universal, Professor Blumrosen believes, that the law should draw the inference of wage discrimination from the bare fact of female predominance.

1. *The presumption would be irrebuttable* — The key to Professor Blumrosen's establishment of a *prima facie* case of wage discrimination is an "inference" — that is, a presumption — of

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<sup>179</sup> *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1170 (3d Cir. 1977).

<sup>180</sup> 438 U.S. 567, 578 (1978).

wage discrimination to be created by showing that the plaintiff's job has traditionally been female- or minority-intensive.<sup>181</sup> This inference supposedly follows from the historical, anthropological, sociological, and economic studies outlined in Part I of *Wage Discrimination*.<sup>182</sup> This article has concentrated predominantly on the problems associated with the creation of Professor Blumrosen's presumption of wage discrimination from the sexual identification of particular occupations in the American economy. As demonstrated in part II of the present article, this presumption would rest upon a very unstable foundation of social science evidence. As shown in part III, the presumption has no antecedents in Title VII's legislative history. Substantial problems would also exist, however, in the operation of this presumption in the courts.

Under the *Wage Discrimination* theory "[t]o make a prima facie case of wage discrimination . . . a plaintiff should have to show only that the job has been and/or is presently identified as a minority or female job."<sup>183</sup> The article asserts that a showing of job segregation may be accomplished entirely by statistics, merely by showing that seventy percent or more of the occupants of the job are women or minorities,<sup>184</sup> and states: "Such a showing would demonstrate that a depressed wage was one of the ad-

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<sup>181</sup> "The establishment of present or past job segregation thus should create an inference of wage discrimination sufficient to constitute a prima facie case." *Wage Discrimination*, *supra* note 1, at 459.

<sup>182</sup> Impassable evidentiary barriers would prevent courts from drawing such an inference. As discussed in part I *supra*, the studies cited by Professor Blumrosen do not speak in a united voice regarding the causes of wage differences. Nor do these sources agree as to whether some fraction of the "earnings gap" between men and women is attributable to wage discrimination. Thus, *Wage Discrimination* and its sources are hardly subjects appropriate for judicial notice. See FRE 201. Under the Federal Rules of Evidence, facts appropriate for judicial notice must be (1) not subject to reasonable dispute, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. FRE 201(b). The studies cited in *Wage Discrimination* are neither. See also *Alvary v. United States*, 302 F.2d 790, 794 (2d Cir. 1962) (fact must be capable of ready verification); *Trans World Airlines, Inc. v. Hughes*, 308 F. Supp. 679, 684 (S.D.N.Y. 1969), modified, 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973); 1 WEINSTEIN'S EVIDENCE ¶ 201[03] (1978).

Professor Blumrosen does not discuss how the courts might be persuaded that her key inference is valid. Certainly the proposition that job separation implies wage discrimination cannot be proved by introduction into evidence of her article or the materials cited in that article. Such documents would be inadmissible hearsay. FRE 801-806.

To persuade courts of the validity of Professor Blumrosen's proposed inference would require testimony by expert witnesses such as the economists, anthropologists, and other social scientists whom Blumrosen selectively cites. The fact that none of these social scientists has ever proposed the Blumrosen theory, much less claimed that the evidence exists to sustain it, suggests that the theory would have a dim future in the courts.

<sup>183</sup> *Wage Discrimination*, *supra* note 1, at 459.

<sup>184</sup> *Id.* at 460-62.

verse effects of job segregation prohibited by Section 703(a)(2). The demonstration of such a wage rate would also establish a violation of Section 703(a)(1)."<sup>185</sup>

Under this theory, a plaintiff would not need to show that his or her wage rate would have been higher in the absence of job separation.<sup>186</sup> The burden of proof would shift to the employer, who has "unique access to, possession of, and control over this evidence."<sup>187</sup> The employer's defense would be impossible in nearly all cases because *Wage Discrimination* prescribes that the employer may not defend a wage structure on the ground that the pay simply reflects the market value of jobs. *Wage Discrimination* specifies that, "absent a showing to the contrary, the market rate reflects discriminatory factors . . . ."<sup>188</sup> Nor can the employer rely on a job evaluation system to sustain its burden of proof unless a successful demonstration can be made that the system is free of discriminatory factors.<sup>189</sup> *Wage Discrimination's* elaborate discussion of job evaluation systems makes a convincing case that such systems are by nature highly subjective. Hence, proof of freedom from bias would be impossible. As was discussed in part I of this article, economists are agreed that the marginal productivity of most jobs is indeterminable. Market rates, job evaluation systems, and marginal productivity analysis are the only possible scales an employer could use to defend its wage structure. Professor Blumrosen would rule out the first two as infected with bias, and the third does not exist except in the abstract calculus of microeconomic theory. The *Wage Discrimination* idea is thus a plaintiff's lawyer's dream: a simple counting of noses establishes the prima facie case, shifting the burden of proof to the employer, and all methods of defense by which the employer might attempt to meet its burden of proof are effectively ruled out. In reality, the presumption Professor Blumrosen has created would be an irrebuttable one.

2. *The presumption cuts too broadly* — Another problem with the presumption of wage discrimination concerns its application to a particular employer's workforce. It is well documented that many women, for personal and cultural reasons, lack interest in certain types of jobs. Their preferences contribute to the concentration of women in traditional occupations. When the percentage of women in a job approaches the seventy

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<sup>185</sup> *Id.* at 459.

<sup>186</sup> *Id.* at 466-68.

<sup>187</sup> *Id.* at 468.

<sup>188</sup> *Id.* at 488.

<sup>189</sup> *Id.* at 489.

percent standard that *Wage Discrimination* sets forth as establishing a prima facie case, should the employer refuse to hire any additional women? Should the employer discriminatorily assign women who seek a traditional women's job to a "non-segregated" (less than seventy-percent female) job category? Even if Professor Blumrosen's inference that job separation equals wage discrimination is generally true, it may be quite mistaken in any specific case. *Wage Discrimination* gives the courts no way to discern when, if ever, the inference of wage discrimination is justified and when it is not.

### B. *The Wage Discrimination Theory and Established Title VII Methods of Proof*

The undoing of the *Wage Discrimination* theory is the very ease with which it would establish a prima facie case. In effect, the theory mistakenly places the burden of proof upon employers to *disprove* discrimination. As shown below, this scheme is contrary to the established Title VII methods of proof.

Under Title VII, two primary theories of discrimination, and thus two methods of proof, are available to private party plaintiffs: disparate treatment and disparate impact.<sup>100</sup> The disparate treatment theory was first used, and is still primarily used, in individual actions. The disparate impact analysis, on the other hand, evolved from large-scale class actions in which plaintiffs alleged that particular employment selection criteria had a detrimental impact on a class of persons protected by Title VII.

A disparate treatment case focuses on discriminatory *motives* behind the employer's action. Although the focus is on motive, the plaintiff need not prove intent. Rather, the claimant must initially prove that certain factors exist that would lead one to infer that the employer's decision was illegally motivated.<sup>101</sup> The

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<sup>100</sup> A third method of proof, demonstration of a pattern or practice of discrimination, is available to the federal government in suits prosecuted under § 707 of Title VII. 42 U.S.C. § 2000e-6 (1976).

<sup>101</sup> In *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), the Court defined the disparate treatment method of proof as follows:

"Disparate treatment" such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

*Id.* at 335 n.15. Although it has not been held that the plaintiff proceeding under a disparate treatment theory is required to submit direct proof of an unlawful motivation, the plaintiff must present a prima facie case of discrimination from which one can reasonably infer that the result in question was intended. *See, e.g., Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). For a dis-

burden of proof is flexible, but the general principle is that the plaintiff must carry "the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act."<sup>192</sup>

Once the plaintiff has established a *prima facie* case, the burden shifts to the defendant to present evidence of some legitimate, nondiscriminatory reason for its decision.<sup>193</sup> Following such a showing, the plaintiff must produce evidence that the defendant's claimed legitimate reasons are merely a pretext for an underlying discriminatory motive. If the supposed legitimate reasons are a pretext, the employer's action is illegal.<sup>194</sup>

Under the disparate impact theory, first enunciated in *Griggs v. Duke Power Company*,<sup>195</sup> a *prima facie* case is established by demonstration that an employment practice, neutral on its face, has an adverse impact upon one or more of the classes of individuals protected under Title VII. No showing of discriminatory intent or unequal treatment is required; instead the focus is upon the *consequences* of a particular employment practice.<sup>196</sup>

Once a disparate impact is established, the employer carries the burden of proving that the specific practice at issue is justified by business necessity.

1. *Disparate treatment under the Wage Discrimination theory* — Professor Blumrosen expects her theory to adhere largely to Title VII methods of proof under the disparate treatment standard in individual, non-class cases. She admits that "in a

cussion of motive in Title VII cases, see generally A. Blumrosen, *Strangers No More: All Workers Are Entitled to "Just Cause" Protection Under Title VII*, 2 INDUS. REL. L.J. 519 (1978); B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1153-54 (1976).

<sup>192</sup> International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977).

<sup>193</sup> See, e.g., Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978).

<sup>194</sup> McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

<sup>195</sup> 401 U.S. 424 (1971). In *Griggs*, the Court was faced with the question of whether an employer was prohibited by Title VII from requiring a high school education or the passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when: (a) neither standard was shown to be significantly related to successful job performance; (b) both requirements operated to disqualify blacks at a substantially higher rate than white applicants; and (c) the jobs in question formerly had been filled only by white employees as part of a long-standing practice of giving preference to whites. *Id.* at 425-26. In this landmark decision, the Court ruled that if an employment practice which operates to exclude blacks cannot be shown to be related to job performance, the practice is prohibited by Title VII. *Id.* at 431.

<sup>196</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971). For example, both *Griggs* and the later case of *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), dealt with employment tests. In these cases, the Court held that in order to establish a *prima facie* case of discrimination, plaintiffs had only to establish that the tests in question, although facially neutral, caused the selection for hire or promotion in a racial pattern *significantly or substantially* different from the pool of available applicants. See note 195 *supra*.

non-class action individual case charging discrimination in compensation based only on a theory of disparate treatment, the plaintiff would have to show that the depressed wage was racially or sexually motivated."<sup>197</sup> Even in the individual disparate treatment case under Professor Blumrosen's theory, the plaintiff would have to make a statistical showing that his or her job is or once was race- or sex-segregated in order to activate the inference of wage discrimination. With respect to *Wage Discrimination's* suggestion that statistical evidence alone could establish the necessary discriminatory motive under a disparate treatment theory, the article fails to take into account the lack of consensus under Title VII as to the extent to which classwide evidence should be considered probative in an action brought by a single person.<sup>198</sup>

2. *Disparate impact and the Wage Discrimination theory* — *Wage Discrimination* never explicitly states in one place that its theory that job segregation implies wage discrimination is merged with a disparate impact analysis. It is clear that a disparate impact approach is intended.<sup>199</sup> To mold the idea that job separation establishes a prima facie case of wage discrimination into disparate impact terms, it would have to be argued that the employer's wage structure is a facially neutral employment practice that promotes consequences violative of Title VII by its adverse impact upon the wages of women and minorities in female- or minority-intensive jobs.

The application of a disparate impact method of proof to the job segregation-wage discrimination theory is specious. Under past employment discrimination cases, a disparate impact approach has been applied to specific employment practices such as testing policies, college degree hiring requirements, hiring exclusions of applicants who had arrest records, and discharge rules based upon garnishments.<sup>200</sup> *Wage Discrimination* does not

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<sup>197</sup> *Wage Discrimination*, *supra* note 1, at 460.

<sup>198</sup> See, e.g., *Davis v. Califano*, 21 Fair Empl. Prac. Cas. 272 (D.C. Cir. 1979) (statistical evidence may be used to establish an individual plaintiff's prima facie case). But see *McFadden v. Baltimore Steamship Trade Ass'n*, 5 Fair Empl. Prac. Cas. 300 (D.C. Md.), *aff'd*, 6 Fair Empl. Prac. Cas. 599 (4th Cir. 1973) (an individual plaintiff may not use statistics, but must present evidence of specific acts of racial discrimination against him in order to establish prima facie case); accord, *Harper v. Trans World Airlines, Inc.*, 525 F.2d 409, 412-14 (8th Cir. 1975); *King v. Yellow Freight System, Inc.*, 523 F.2d 879, 882 (8th Cir. 1975).

<sup>199</sup> *Wage Discrimination*, *supra* note 1, at 463.

<sup>200</sup> See, e.g., *Wallace v. Debron Corp.*, 494 F.2d 674 (8th Cir. 1974) (employer policy requiring discharge for two garnishments within 12 months held a prima facie violation of Title VII); *Spurlock v. United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972) (requirement of college degree for pilots is job related); *Johnson v. Goodyear Tire & Rubber Co.*, 349 F.

propose a disparate impact analysis of a specific employer practice but rather a wholesale assault on the employer's wage structure.

One suspects that the difficulty Professor Blumrosen encounters in elucidating how this wage discrimination approach is to be applied under a disparate impact method of proof stems largely from her article's quicksilver use of the term "job segregation." On the one hand, she applies the term as it has historically been used in Title VII case law: the intentional segregation of occupations by sex or race. On the other hand, she uses "job segregation" to denote the lingering presence of traditional women's jobs or minorities' jobs, no longer intentionally segregated, but disproportionately populated by members of these groups. This phenomenon might be termed "transitional" job separation, no longer intentional in most cases, but unavoidable in a period in which "the time lag in wage rate revision means that for most of those jobs the wage structure still reflects the depressed rate which was associated with its segregated character."<sup>201</sup> Professor Blumrosen supports her argument by exploiting the ambiguity in this double-jointed definition of "job segregation." She buttresses her contention that the Title VII standard of proof (that a plaintiff need not prove the amount he or she would have earned in the absence of discrimination) should apply in wage discrimination suits by citing several cases in which discriminatory job assignments or the existence of segregated job classifications were held to establish a *prima facie* violation of Title VII without a demonstration of economic harm.<sup>202</sup> But in these cases the plaintiffs had clearly demonstrated that the defendants had discriminatorily assigned them to lower status positions. The courts have long held that plaintiffs in cases of discriminatory assignments do not have to submit evidence of lower pay as an element of their *prima facie* case.<sup>203</sup> These decisions, however, do not support the argument that, where "transitional job separation" is combined with *the absence of a discriminatory*

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Supp. 3 (S.D. Tex. 1972), *aff'd*, 491 F.2d 1364 (5th Cir. 1974) (high school diploma not job related); *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 491, *aff'd*, 472 F.2d 631 (9th Cir. 1972) (policy of excluding applicants with arrest records violates Title VII).

<sup>201</sup> *Wage Discrimination*, *supra* note 1, at 460.

<sup>202</sup> *Id.* at 463-65. Among these cases are *Swint v. Pullman-Standard*, 539 F.2d 77 (5th Cir. 1976) (discrimination in job assignments established *prima facie* case); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977) (discriminatory job assignments and segregated facilities violated Title VII); *Reed v. Arlington Hotel Co., Inc.*, 476 F.2d 721 (8th Cir. 1973) (maintenance of segregated job classifications established Title VII violation).

<sup>203</sup> *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747 (1976); *Swint v. Pullman-Standard*, 539 F.2d 77, 90 (5th Cir. 1976).

*assignment*, a wage discrimination plaintiff need not show economic disparity, but only that her job contains over seventy percent women, in order to demonstrate a *prima facie* violation of Title VII.

It is clear that Professor Blumrosen uses the term "job segregation," in both of its definitions, as a mechanism to pull wage discrimination into the remedial ambit of Title VII. Her article is unconcerned with past Title VII remedies for job segregation, *e.g.*, hires, transfers, and promotions into higher status jobs, which it terms inadequate; the article seeks more money for individuals who stay in the traditional jobs. Professor Blumrosen views the problem of wage discrimination as one of the "discriminatory radiations from job segregation."<sup>204</sup> The chief problem here is that Congress intended either to deal with these problems separately or, more charitably to Professor Blumrosen's view, never made the linkage between the problems at all. From the existing legislative history, it certainly appears that Congress intended to remedy wage discrimination through the EPA standards, whether suit is brought under that statute or under Title VII.<sup>205</sup> The result is that the disparate impact approach of Title VII is inapplicable to wage compensation suits.

3. *Title VII wage discrimination cases* — All Title VII wage discrimination decisions have placed the burden of proof upon the plaintiff to demonstrate that the wage inequity was the result of prohibited discrimination.

In the leading case in this area, *Christensen v. Iowa*,<sup>206</sup> the plaintiffs were female clerical workers who received less pay than physical plant workers, who were primarily male, for dissimilar work of equal value to their employer. The plaintiffs claimed that they were victims of sex-based compensation discrimination prohibited by Title VII. The Court of Appeals for the Eighth Circuit held that apart from considerations of the Bennett Amend-

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<sup>204</sup> *Wage Discrimination*, *supra* note 1, at 465.

<sup>205</sup> See part II *supra*.

<sup>206</sup> 563 F.2d 353 (8th Cir. 1977). *Christensen* is not cited in the text of *Wage Discrimination* (though it is cited in the footnotes, see *Wage Discrimination*, *supra* note 1, at 489 n.327 & 495 n.345), no doubt because the case was predicated on a Title VII job comparability theory of wage discrimination that Professor Blumrosen seeks to distinguish from a wage discrimination theory predicated upon job segregation.

The EEOC submitted an *amicus* brief in *Christensen*, taking the position that the university's maintenance of wage disparities between male and female jobs that it knew were of equal value amounted to unlawful discrimination under Title VII because (1) the university was aware that the wage disparities in the labor market were largely the result of societal discrimination, and (2) the university made no attempt to determine the extent to which the wage differentials were justified by economic factors or required by business necessity.



ment's applicability,<sup>207</sup> plaintiffs had failed to establish a prima facie case under Title VII because they had not shown that "the difference in wages paid to clerical workers and plant employees rested on sex discrimination and not on some other legitimate reason."<sup>208</sup> The evidence established that the employer paid higher wages to plant workers because higher wages were paid for such work in the local labor market.<sup>209</sup>

The *Christensen* court noted the plaintiffs' attempt to fit their complaint to the disparate impact method of proof.<sup>210</sup> The court then decisively rejected this theory on the basis that Title VII does not apply to wage scales at all. Title VII, *Christensen* holds, is directed at equal employment opportunities, not equal wages.<sup>211</sup>

In a second recent federal court decision, *Lemons v. City and County of Denver*,<sup>212</sup> the court held that the city had not violated Title VII despite the plaintiffs' contention that the defendants paid nurses, a female-dominated profession, less than it paid other employees for work of comparable value in male-domi-

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<sup>207</sup> The *Christensen* court explicitly left the Bennett Amendment issue unresolved. If the court had held that the Bennett Amendment applied, the plaintiffs would have had to demonstrate that the work of the clerical and plant workers was "substantially equal" in order to make out a prima facie case under Title VII.

<sup>208</sup> *Christensen v. Iowa*, 563 F.2d 353, 355 (8th Cir. 1977).

The decision in *Christensen* could equally well have been reached on an alternative ground that the court did not discuss. Even if the plaintiffs' evidence met the disparate impact criteria for a prima facie case, the employer rebutted that case by showing that its actions were required by business necessity. In a free market economy, the necessity to hold costs, including wages, down to those mandated by the market is the most pressing business necessity of all, the *sine qua non* of business survival.

<sup>209</sup> The court stated:

Appellants' theory ignores economic realities. The value of the job to the employer represents but one factor affecting wages. Other factors may include the supply of workers willing to do the job and the ability of the workers to band together to bargain collectively for higher wages. We find nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work. We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications.

*Id.* at 356.

<sup>210</sup> Appellants contend the [defendant] UNI's policy violates Title VII by perpetuating wage differences resulting from past discrimination. . . . [The contention is that] UNI's reliance in part on prevailing wage rates in determining beginning pay scales for jobs of equal worth to the university serves to carry over the effects of sex discrimination in the marketplace into the wage policies of the college.

*Id.* at 355-56.

<sup>211</sup> *Id.* at 356. Judge Miller disagreed with this basis of the court's opinion, but concurred because he found the Bennett Amendment applicable. *Id.* at 357 (concurring opinion).

<sup>212</sup> 17 Fair Empl. Prac. Cas. 906 (D. Colo. 1978), *aff'd* DAILY LAB. REP. (BNA), No. 81 at D-1 (10th Cir. April 24, 1980).

nated occupations. As in *Christensen*, the court stated that there had been no showing of wage differentials based directly or indirectly on sex discrimination except insofar as historical discrimination had created a lower pay scale for certain occupations traditionally performed by women. The court found that the city had simply relied on market forces in setting its pay scales.<sup>213</sup> The court had grave misgivings concerning an approach to wage discrimination that ignored labor market economics, stating: "Congress cannot, and never has been able, to repeal the law of supply and demand. And the situation, unfortunate that it may be, is that the supply of nurses is very large compared to the demand, and it puts the nurses in a somewhat disadvantageous negotiating position."<sup>214</sup>

It should be noted that even in *Gunther v. County of Washington*,<sup>215</sup> an appellate decision supporting the argument that the Bennett Amendment incorporates only the four affirmative defenses of the EPA into Title VII and that, therefore, a Title VII wage discrimination claim may be asserted when the pay differential is not between "substantially equal" jobs, *the burden to demonstrate sex discrimination remained on the plaintiff*. The court held that on remand plaintiffs should have an opportunity to show that "some of the discrepancy in wages was due to sex discrimination."<sup>216</sup>

These cases uniformly have held that the burden of proof is upon the plaintiffs in Title VII compensation cases to establish a prima facie case that an inequality in pay is based upon sex discrimination. Even more important, *Christensen* and *Lemons* emphatically indicate that the local labor market may be considered by the employer in setting wage rates. In the words of the *Christensen* court, to ignore such market rates "ignores economic realities."<sup>217</sup>

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<sup>213</sup> *Id.* at 913.

<sup>214</sup> *Id.* at 909. As Chief Judge Winner perceived the issue in *Lemons*, the acceptance of the plaintiffs' view that Title VII can reach wage discrimination not actionable under the EPA would open "the Pandora's box of restructuring the entire economy of the United States of America." *Id.*

<sup>215</sup> 602 F.2d 882 (9th Cir. 1979).

<sup>216</sup> *Id.* at 888, 894.

<sup>217</sup> *Christensen v. Iowa*, 563 F.2d 353, 356 (8th Cir. 1977). *Wage Discrimination* cites *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974), for the proposition that the market rate or "community wage structure" is not a defense to a Title VII wage discrimination claim. *Wage Discrimination*, *supra* note 1, at 488-89. The citation is inapposite. *Corning Glass* did not involve Title VII at all, but rather the EPA, and in that case the employer attempted to use "market price" as a defense for its practice of paying women less than men for substantially the same job. This was the very evil that the EPA was designed to remedy. The courts have long held that market forces will not justify a wage inequality when men's and women's jobs are substantially equal in job content. See, e.g., Hodgson

#### IV. THE CONGRESSIONAL RESPONSE

Congress could, if it chose to do so, enlarge the EPA or Title VII to include "comparable worth." The law would then require that all "men's" and "women's" jobs be paid identically except for pay differences proportionate to the relative "worth" of jobs. By incorporating the comparable worth theory into the law, Congress would be mandating an entire scale of relative wages, leaving to the courts the formidable task of spelling out the details. This section will set forth several reasons why such a statute would be unwise.

##### A. *The Measurability of Wage Discrimination*

Professor Blumrosen has argued that the courts should adapt remedial statutes such as Title VII "to address those problems which come newly into focus."<sup>218</sup> The converse is no less true: the courts — and Congress — should refrain from attempting to address alleged problems that cannot be brought into focus. Despite Professor Blumrosen's exposition, wage discrimination remains an amorphous theory and an unmeasurable concept. We have explained in part I why it appears that wage discrimination cannot be dissected from other and legitimate sources of wage differentials. Even if advances in economic theory might someday change the situation, the experts agree that the necessary analytical methodology does not exist today.<sup>219</sup>

This is not the familiar problem of evaluating a damage that is by nature imprecise: the courts cope well enough with even such inexact quantities as the value of life itself. The problem with wage discrimination is of another magnitude altogether. Residual wage differentials *could* arise in part from wage discrimination, but they also *could* — and at least in part *do* — arise from other causes.<sup>220</sup> Any statute that attempted to require the courts to discern and measure such indeterminate quantities would only mire our legal machinery in judicial quicksand.

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v. Brookhaven Gen. Hosp., 436 F.2d 719 (5th Cir. 1970). The touchstone of the EPA is job content: when it is the same for men and women, market rates are irrelevant. *But see* Horner v. Mary Institute, DAILY LAB. REP. (BNA), No. 13, at A-4 (8th Cir. Jan. 18, 1980), in which the court stated in dictum that, if the plaintiff had shown that her job was substantially equal to that of a male colleague, his higher salary would still have been justified by his greater value in the job market.

<sup>218</sup> *Wage Discrimination*, *supra* note 1, at 502.

<sup>219</sup> See Kahne & Kohen, *supra* note 81, at 1258-61, who acknowledge that economic theory and analysis of male-female wage differentials are in a state of disarray. See also J. MADDEN, *supra* note 72, at 20-23; and Aigner & Cain, *supra* note 125, at 187-88.

<sup>220</sup> See part I *supra*.

### B. *Equitable Enforcement of the Comparable Worth Theory*

The difficulty becomes apparent as soon as one descends from the abstractions of theory to outline how comparable worth theory could be applied to the realities of a wage structure. Suppose, for example, that a bias-free, universal job evaluation system has been developed and has been applied to the wage structures of the Shady Dell and Moderne nursing homes:

FIGURE 2

Job Evaluation System Points	Job Title	<u>Shady Dell</u>		<u>Moderne</u>	
		<u>Sex</u>	<u>Salary</u>	<u>Sex</u>	<u>Salary</u>
40	gardener	M	\$8,000	M	\$7,250
50	--	--	--	--	--
60	attendant	F	8,000	F	8,000
70	--	--	--	--	--
80	nurse	F	16,000	F	14,500
90	administrator	M	17,000	F	14,995
100	physician	M	40,000	--	--

If Title VII were amended to incorporate the comparable worth theory, to what salaries would the female employees be entitled? If "comparable" means "equal," they presumably would not be entitled to relief under Title VII: no male job is equal in "worth" (job evaluation systems points) to a female job. Suppose, then, that "comparable" is given a more expansive meaning: male and female jobs must be paid in proportion to their point value in the job evaluation system.

Shady Dell's nurses file suit for an injunction to raise their salary from the present \$16,000 to \$32,000, their rightful proportion (80%) of the physicians' salary. The nursing home owner argues that the nurses are fairly paid: their job is "worth" twice as much as the (male) gardeners' job and is paid proportionately more, \$16,000 as compared with \$8,000. Further, the employer argues, the job most nearly comparable to the nurses' in "worth" is the administrators' job. Administrators are "worth" one-eighth more than nurses but earn only one-sixteenth more. Meanwhile, the attendants demand \$24,000 (60% of the physicians' salary), and the employer must pay them that amount, or at least \$12,000 (150% of the gardeners' salary), or \$11,333 (66-2/3% of the administrators' salary) or something in between. Comparable worth theorists have not discussed *which* "male" jobs would be

used for comparison purposes. It would take the wisdom of Solomon to solve this conundrum. But even Solomon could not do equity as between Shady Dell and Moderne. Moderne has no physicians on its staff; it contracts out for their services. Its nurses have no comparable worth claim, for they are paid twice as much as Moderne's only male employees, the gardeners, and their job is "worth" twice as much. Moderne's attendants, however, do have a claim: their job is "worth" 50% more than the gardeners', so perhaps they will have to be paid \$10,875.

If the outcome is that Shady Dell must pay its nurses \$32,000 and Moderne must pay its attendants \$10,875, a further development is reasonably foreseeable. Shady Dell and Moderne will likely succumb to competitors that contract out for the services of physicians and gardeners.<sup>221</sup>

The difficulty of doing equity by mathematics at the hypothetical Shady Dell and Moderne would be far more complicated — and still more impossible — in the far more complex real world.

### C. *Financial Burdens on Government and Business*

1. *Direct costs* — Among the direct costs of comparable worth theory would be the regulatory expenses of agencies in the Executive Branch, expenses of the courts, and litigation costs of employers and employees. These costs would be a great deal larger than for Title VII because Professor Blumrosen's proposed standard of proof would give a winning case to the great majority of all female employees.<sup>222</sup> Employers would also bear the consid-

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<sup>221</sup> For examples of analogous actual developments in the equal pay area, see Glucklich, Hall, Povall & Snell, *Equal Pay: Time to Go Back to the Drawing Board*, 9 PERSONNEL MANAGEMENT 16 (No. 1 January 1977).

<sup>222</sup> See part III *supra*. Moreover, an employer's potential liability under a Title VII wage discrimination action would, in most cases, be far greater than under a corresponding Title VII-EPA wage claim, which requires that a plaintiff demonstrate a prima facie case under EPA standards. For example, assume that a large manufacturing enterprise, which encompasses several plants located in a dozen states, faces a class action liability under Professor Blumrosen's theory that it has underpaid clerical employees, who are primarily women, on a company-wide basis. Under the Blumrosen approach to Title VII job comparability, the plaintiffs could seek damages for wage discrimination on a company-wide basis. However, under the existing Title VII-equal pay cases, the plaintiffs would be restricted by the EPA's standards, which require a plaintiff to demonstrate that a wage differential existed for equal work *within the same establishment*. *Orr v. Frank R. McNeill & Son, Inc.*, 511 F.2d 166, 170-71 (5th Cir.), cert. denied, 423 U.S. 865 (1975). But see *Wetzel v. Liberty Mutual Ins. Co.*, 449 F. Supp. 397, 16 Empl. Prac. Dec. ¶ 8343 (W.D. Pa. 1978) ("establishment" requirement of EPA not a limitation on Title VII-equal pay claims). Because a Title VII wage discrimination case under Professor Blumrosen's theory would no longer be circumscribed by any EPA standards — including the establishment requirement — an employer's potential liability would be explosively expanded.

erable cost of installing and maintaining job evaluation systems.

2. *Indirect costs* — One of the largest costs of the comparable worth theory would be a distortion of the economy as employers struggle to pay market rates rather than rates dictated by a universal job evaluation system. Adoption of the comparable worth theory would not relieve employers of the constraints of the market. The costs of raw materials and capital and the prices that could be charged would still depend on market forces. Employers would, of course, attempt to find loopholes through which they could pay market prices for labor. The history of the Internal Revenue Code is instructive in this respect. The efflorescing of section upon section, the piling of regulation upon regulation, is largely the natural result of taxpayers' ingenuity in finding ways to comply with the letter of the law while avoiding the taxes that the law intended to impose. Some of the tactics for avoiding comparable worth theory are outlined below:

a. *Export of jobs.* Large numbers of "women's" jobs are suitable for export. Clothing, for example, can be manufactured as readily in Hong Kong and Seoul as in New York City. This is why the union with the highest proportion of female members of any major union, the International Ladies Garment Workers Union, is so vehemently opposed to the comparable worth movement. The president of that union has stated: "I'll be damned if I know a way to get the women more money . . . The value of their work isn't set by theoretical principles but on the value of the work in the marketplace and in the face of competition from overseas, where garment workers make 30 cents an hour."<sup>223</sup>

b. *Contracting out.* Businesses already contract out for services whose wage structures fit awkwardly with the primary enterprise. For example, many businesses contract for the services of attorneys and physicians at the high end of the scale, and for food service workers and janitorial services at the low end. Contracting out large numbers of traditionally "female" or "male" jobs would be expensive, both for the individual enterprise and for the economy as a whole. For a company faced with enormously increased labor costs, however, even large sacrifices in efficiency would be economically attractive. Consider, for example, an appliance retailer who employs office workers, a sales force, and repairmen. Almost all the office workers are female; almost all the others are male. Assume that Congress had adopted the comparable worth theory and mandated the use of a job evalua-

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<sup>223</sup> Address by S. Chaikin, President, ILGWU, AFL-CIO Annual Convention, Washington, D.C. (Nov. 15-20, 1979), quoted in *The New Pay Push for Women*, BUS. WEEK, Dec. 17, 1979, at 69.

tion system developed by the NAS as the standard by which "worth" must be assessed. According to this system, the "worth" of the salesmen is forty-three percent more than that of the office workers, and the "worth" of the repairmen is twenty-seven percent more than that of the office workers. The company has been paying both salesmen and repairmen ninety percent more than office workers.

The company is in a dilemma. It cannot afford to raise the office workers' salaries as high as the job evaluation system mandates, because the profit margins in its business are too low. It cannot cut the men's salaries, both because the law prohibits it and because the market value of the men's skills would enable them to move to the greener pastures of self-employment or other employment rather than take large pay cuts. In the long run it is likely that the salesmen and the repairmen will move to independent, self-employed jobs, or will organize themselves in business enterprises which are too small to come under the jurisdiction of Title VII, or which consist of all male repairmen and/or all male salesmen. These men will then be able to earn "market" recompense for their efforts. Such an atomized fragmentation of business organizations is probably quite inefficient and would raise the costs of goods and services to the entire society.

c. *Overturning congressional determination of the minimum wage.* Setting the minimum wage rate requires a balancing of competing considerations.<sup>224</sup> The balancing of complex, unquantifiable factors is the sort of decision-making that is best suited to the legislature, not the judiciary. To a large extent, Professor Blumrosen's proposal would take the minimum wage decision away from Congress and the states. For affected occupations, the courts would be required to set the wages, and to decide without reference to the many legitimate factors that economists and interest groups place before national and state legislatures.<sup>225</sup> In-

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<sup>224</sup> The interests affected by the minimum wage are far more complex than those of employers versus workers. Increases in minimum wages benefit not only low-wage employees, but also medium-wage employers, who are freed of competition from low-wage employers. Some low-wage employees benefit from higher wages, but others suffer recurrent or even permanent unemployment, as their jobs are lost to automation, imported goods, and/or illegal alien workers. See, e.g., C. STEWART, JR., *LOW-WAGE WORKERS IN AN AFFLUENT SOCIETY* (1974); Falconer, *The Minimum Wage: A Perspective*, 3 *FEDERAL RESERVE BANK OF NEW YORK QUARTERLY REV.* 3 (Autumn 1978); Kosters & Welch, *The Effects of Minimum Wages by Race, Sex, and Age*, in *RACIAL DISCRIMINATION IN ECONOMIC LIFE*, *supra* note 80, at 103; Moore, *The Effect of Minimum Wages on Teenage Unemployment Rates*, 79 *J. POL. ECON.* 897 (1971); Weintraub, *A Comment on Regional Differentials in the Differential Between Nonwhite and White Unemployment Rates*, 79 *J. POL. ECON.* 200 (1971).

<sup>225</sup> See, e.g., L. WEINER, *FEDERAL WAGE AND HOUR LAW* 14-19 (1977), for a discussion of

stead, the courts would have to set wages according to inferences from abstract theory.

The occupations affected would be those that are female-intensive and are paid at or near the minimum wage. A number of such jobs, employing many thousands of people, are likely to be among those affected by comparable worth theory.<sup>226</sup> Wages set by reference to only one factor — comparable worth — would likely be much further from the optimum than wages set by legislative bodies, which are free to attend to all factors.<sup>227</sup>

Illegal immigration is one example of the serious problems that would be exacerbated if minimum wages were set by a comparable worth theory formula rather than by legislative decision. The higher the minimum wage, the more displacement of legal workers by illegal aliens. This is no mere marginal problem; for example, an estimated sixty to seventy percent of garment workers employed in the United States are illegal aliens.<sup>228</sup> If garment worker minimum wages are raised by application of comparable worth theory, it is logical to expect that still more citizens and legal aliens will be replaced by illegal aliens.<sup>229</sup>

*d. Inflation.* Implementation of comparable worth theory would increase the wages of many women, but it would not increase productivity at all. The result would be massive inflation.<sup>230</sup> Excessive inflation harms the entire economy by encouraging immediate consumption at the expense of savings and

the policy and purposes of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1976) (FLSA), the principal federal statute prescribing minimum wage and overtime coverage. With respect to both minimum wage and overtime, the FLSA contains a complex array of industry exemptions. *Id.* at 109-45.

<sup>226</sup> Jobs likely to be affected include garment trades, entry level clerical jobs, food service workers, and hospital and nursing home attendants. *See, e.g.,* M. WITT & P. NAHERNY, *WOMEN'S WORK — UP FROM .878* (Univ. of Wis. Extension, Madison 1975).

<sup>227</sup> Congress cannot satisfy all the diverse interests, but it can take many interests into account in setting minimum wages. The comparable worth theory would take account of no interests, but would operate on the basis of its theory alone.

<sup>228</sup> *AFL-CIO Adamant Against Illegal Aliens*, S. F. Chronicle, Feb. 26, 1980, at 23, col. 1.

<sup>229</sup> Illegal aliens impose substantial costs on the economy. Some of the most important costs, such as welfare payments to unemployed legal residents who are displaced, are difficult to estimate. At least one cost item can be determined: the cost of apprehending and expelling illegal immigrants. The Immigration and Naturalization Service expelled 1,430,902 illegal aliens in 1977 alone, an activity that must have cost a very substantial amount. CONGRESSIONAL RESEARCH SERVICE, *U.S. IMMIGRATION LAW AND POLICY 1952-1979* at 34, Table 2 (1979).

<sup>230</sup> It has been estimated that the total dollar amount required annually to achieve pay parity between full-time working women and men in the United States would be \$150 billion. Smith, *supra* note 134, at 58-59. The addition of this staggering sum to employee wages would generate an enormous inflationary reaction within the economy.



investment.<sup>231</sup>

#### *D. The Effect of the Comparable Worth Theory on Women*

The inflationary consequences of implementation of the comparable worth theory would affect different groups unequally. Women working in traditionally female jobs would be protected, provided their employers also have traditionally male jobs and fill them with men. The comparable worth law would raise such women's wages. These women's husbands and children would also benefit, as would their ex-spouses.<sup>232</sup> But other groups, probably including the large majority of women, would suffer disproportionate losses of purchasing power. These groups include: most married women and their dependents, for the majority of married women are not employed outside the home;<sup>233</sup> all non-employed single women and their dependents (especially mothers on welfare to the extent that welfare allowances lag behind inflation); all non-employed widows and retired women;<sup>234</sup> all women working in traditionally "mixed" jobs and in traditionally "men's" jobs; and all women working in traditionally "women's" jobs, but in all-female work forces, e.g., nursery schools and child care centers, or for employers too small to be covered by Title VII. This last group includes the most poorly paid of all employees, private household workers.

Thus, the income redistributed by comparable worth theory would flow mainly to single women and to families without young children. The additional real income to those groups would be taken largely from families in which one or more women were not working because of age, illness, or the need to care for young children. We doubt that a convincing case could be made that such a redistribution of real income would be beneficial to the nation as a whole.

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<sup>231</sup> P. SAMUELSON, *supra* note 46, at 273.

<sup>232</sup> Former husbands would benefit from reductions in the need for child support and alimony.

<sup>233</sup> In May 1979, 46.4% of married women were employed, 2.1% were unemployed, and 51.6% were not in the labor force. U.S. DEP'T OF LABOR, WOMEN IN THE LABOR FORCE: SOME NEW DATA SERIES 5, Table 6 (Report No. 575, 1979). *But see* 102 L.R.R.M. 98 (1979) (prediction that by 1990 "the stereotype of the wife as one who stays home with the children will apply to about a quarter of all married women," citing *THE SUBTLE REVOLUTION: WOMEN AT WORK* (H. Barrett ed. 1979)).

<sup>234</sup> Widowers, retired men, and the wives of retired men would also suffer a loss of purchasing power, but because of women's longer life span, the group of older persons is primarily female. Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978) ("[W]omen, as a class, do live longer than men").

*E. The Effect of the Comparable Worth Theory on Job Integration*

The ultimate goal of Title VII is the achievement of equality of employment opportunities.<sup>235</sup> This goal is attainable in the workplace only through job integration. The adoption of a comparable worth approach to wage discrimination would inhibit, perhaps even imperil, the attainment of job integration.

The legislative histories of Title VII and its 1972 amendments demonstrate that Congress' principal motivation for the enactment of these statutes was to remedy pervasive exclusionary discrimination in employment, especially against blacks.<sup>236</sup> The primary intent of Congress was to end job segregation or, more broadly stated, to end the segregation of employment opportunities.<sup>237</sup> With respect to sex discrimination, Congress was chiefly, and almost exclusively, concerned with the problem of job segregation resulting from discrimination in hiring, promotion, recruitment, and job assignment. For example, the Senate Report reviewing the administration of the sex discrimination provisions of Title VII during the enactment of the Equal Employment Opportunity Act of 1972<sup>238</sup> stated: "Despite the large increase in the numbers of women in the work force, women continue to be relegated to low paying positions and are precluded from high paying executive positions. Similarly, the rate of advancement for women is slower than for men in similar positions."<sup>239</sup> The House Report echoed the same concern: "Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less

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<sup>235</sup> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities . . ." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971).

<sup>236</sup> 110 CONG. REC. 6548 (1964) (remarks of Senator Humphrey); *id.* at 7204-05 (remarks of Senator Clark); *United Steelworkers of America v. Weber*, — U.S. —, 99 S. Ct. 2721, 2729 (1979).

<sup>237</sup> 110 CONG. REC. 6547-48 (1964) (remarks of Senator Humphrey); *id.* at 6552 (remarks of Senator Kennedy). See also Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465 (1968), in which Professor Alfred Blumrosen, who is the husband of the author of *Wage Discrimination*, stated: "Discrimination in recruitment and hiring is the chief measurable evil against which the modern law of employment discrimination is directed. . . . The elimination of minority differential in unemployment rates will be a true signal that equal employment opportunity does in fact exist." *Id.* at 465-66.

<sup>238</sup> 42 U.S.C. §§ 2000e to 2000e-16 (1976).

<sup>239</sup> S. REP. NO. 92-415, 92d Cong., 1st Sess. (1971), reprinted in LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 416 (Comm. Print 1972) [hereinafter cited as LEGISLATIVE HISTORY OF EEO].

responsible and the less remunerative positions on the basis of their sex alone."<sup>240</sup>

The legislative record is bereft of any reference to comparable worth or wage discrimination, so Professor Blumrosen's assertion that Congress dealt with wage discrimination as one of the "discriminatory radiations of job segregation"<sup>241</sup> has no basis in fact. Instead, the legislative focus was upon job segregation itself and the removal of discriminatory barriers barring women from more challenging, responsible, and remunerative positions.

A comparable worth approach to residual wage differentials would not bring our society closer to the goal of job integration. Such an approach would quash perhaps the most powerful incentive for women to enter occupations historically held by men: the prospect of higher pay. If employers are required to pay higher wages for traditional "women's" jobs, women holding those jobs will have substantially less incentive to become pioneers in integrating the predominantly male jobs. Almost certainly the result would be a decrease in the movement of women into "men's" jobs.

Another and even more deleterious consequence of the implementation of comparable worth theory is the fact that it would give employers large incentives to segregate their work forces. Under a comparable worth theory, particularly under Professor Blumrosen's variant,<sup>242</sup> it is impossible for an employer to know whether or not it is in compliance with Title VII. Even the most well-intentioned of employers would face substantial liability in "comparable worth" back pay awards. The necessity of remaining competitive in the marketplace would spawn employer avoidance techniques. In order to reduce the uncertainty of compliance and minimize exposure to large damage awards, as well as compete in the marketplace, employers would seek to escape comparable worth problems by contracting out work. In many cases the subcontractors would be single-sex organizations that would not be affected by Title VII wage discrimination liability.<sup>243</sup>

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<sup>240</sup> H.R. REP. NO. 92-238, 92d Cong., 1st Sess. (1971), reprinted in *LEGISLATIVE HISTORY OF EEO*, *supra* note 239, at 64.

<sup>241</sup> *Wage Discrimination*, *supra* note 1, at 465.

<sup>242</sup> Under Professor Blumrosen's theory, employers would be virtually precluded from a defense of pay differentials on the basis that the differences reflect the external labor market or that they conform to an internal job evaluation system. See text accompanying notes 188-89 *supra*.

<sup>243</sup> See 42 U.S.C. § 2000e-2(h) (1976). Under this section of Title VII "[i]t shall not be an unlawful employment practice for an employer to apply different standards of compensation . . . to employees who work at different locations . . . ." Because this section

Finally, Professor Blumrosen's approach would inhibit job integration by imposing liability on those employers who actively pursued job integration as well as on those who did not.<sup>244</sup> Employers then surely would neglect their affirmative action and equal employment opportunity efforts because they would see that no matter how much financial investment they made, they would still face very large liabilities.

### F. Existing Remedies

Rejection of the comparable worth theory by no means implies acceptance of wage discrimination. The statute books already contain a formidable armamentarium of laws whose impacts are reducing the wage differentials between the sexes. The EPA<sup>245</sup> and many similar state statutes<sup>246</sup> prohibit the most direct form of sex discrimination in wages, unequal pay for equal work. Substantial awards have been granted under the EPA,<sup>247</sup> and its effects spread far beyond the cases that have gone to judgment. As with most statutes, cases that go to trial are only a small fraction of the cases that are settled, and the cases that are settled are only a fraction of the cases that might have been brought were it not for widespread voluntary compliance with the law.

The EPA does not reach allegations of wage discrimination involving dissimilar jobs, but Title VII and similar state statutes in the large majority of states are powerful indirect forces against

restricts Title VII's application to one "location" of a single employer, it is implausible that Congress intended Title VII wage comparisons to be made between *different* employers at *different* locations.

<sup>244</sup> The employer who brought men into what had been "women's" jobs would be no less liable than the employer who maintained a segregated work force. *Wage Discrimination*, *supra* note 1, at 498-99. Nor could the employer decrease its liability by increasing the wage for the traditional women's job. Under the *Wage Discrimination* presumption, the mere fact of a job that is *or was* female-intensive creates an inference of illegal wage discrimination—no matter what wage the employer actually pays. See text accompanying notes 183-84 *supra*.

<sup>245</sup> 29 U.S.C. § 206(d) (1976).

<sup>246</sup> Thirty-seven states presently have statutes, similar to the EPA, proscribing unequal pay for equal work. 8A FAIR EMPL. PRAC. MAN. (BNA) 499, 503 (1980). See, e.g., CAL. LAB. CODE § 1197.5 (Deering Supp. 1979).

<sup>247</sup> See, e.g., 2 EQUAL EMPLOYER (FED.) ¶ 2 (Jan. 2, 1978) (Smith College agreed to pay \$136,000 in back wages to 143 female custodial employees in settlement of EPA action brought by the Department of Labor (DOL)); 1 EQUAL EMPLOYER (FED.) ¶ 297 (Aug. 29, 1977) (Iowa school district agreed to settle EPA action filed by DOL on behalf of 27 women custodial employees for "over \$100,000"); 1 EQUAL EMPLOYER (FED.) ¶ 147 (Apr. 25, 1977) (Cambridge, Massachusetts, settled DOL-initiated EPA cases involving 283 present and former nurse's aides for \$257,000 in back wages).

During the fiscal year ending September 20, 1979, the DOL recovered \$10.3 million in settlements and awards in EPA cases. 102 LAB. REL. REP. (BNA) 290 (1979). The DOL statistics do not include amounts recovered in private EPA actions.

wage discrimination. These anti-job-segregation statutes protect workers' rights to integrate traditionally single-sex jobs. Since wage discrimination cannot survive the end of job separation, the integration of the workforce means the end of such wage discrimination as may exist. The force of Title VII is augmented by Executive Order No. 11,246 and its amendments<sup>248</sup> and its many state and municipal analogs, together with associated regulations and guidelines.<sup>249</sup> These laws place the weight of federal and state regulatory authority behind job integration; they use the power to withhold government contracts to impel employers to action; and they require employers to take the initiative to integrate their workforces. As with many governmental regulatory activities (or for that matter, private regulatory activities), the enforcement of Executive Order No. 11,246 has been uneven in vigor and effectiveness. But recent events make it clear that Executive Order No. 11,246 is no paper tiger.<sup>250</sup> The goals of governmental regulation are more likely to be achieved by improving the internal efficiency of the enforcement agencies than by generating entirely new responsibilities, together with the corresponding multiplication of rules, regulations, guidelines, and procedures,<sup>251</sup> for the agencies and courts.

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<sup>248</sup> Exec. Order No. 11,246, 3 C.F.R. 1964-1965 Comp. 339 (1967), *reprinted in* 42 U.S.C. § 2000e app., at 1232 (1976), *as amended by* Exec. Order No. 11,375, 3 C.F.R. 1966-1970 Comp. 684 (1971) and Exec. Order No. 11,478, 3 C.F.R. 1966-1970 Comp. 803 (1971).

<sup>249</sup> See, e.g., 29 C.F.R. §§ 1600.735-1643.707 (1979) (EEOC rules and regulations), 8 CAL. ADMIN. CODE §§ 295-296.4 (rules and regulations of California Fair Employment Practices Commission) (1979).

<sup>250</sup> For example, on June 28, 1979, Uniroyal, Inc., was debarred by the OFCCP and declared ineligible to receive government contracts or subcontracts. 3 EQUAL EMPLOYER (FED.) ¶ 270 (July 16, 1979). Uniroyal is the largest firm to date to be debarred because of discrimination under Exec. Order No. 11,246. At the time it was cut off from new government business, Uniroyal had more than \$36 million in federal government contracts. Uniroyal subsequently agreed to settle its debarment case by paying \$5.2 million to 750 female current and former employees and restoring their pension and seniority status. This backpay award is the largest settlement in such a case since 1973, when American Telephone & Telegraph Co. agreed to pay \$52 million. Under the terms of the Uniroyal settlement, the OFCCP agreed to reinstate Uniroyal as an eligible government contractor. 3 EQUAL EMPLOYER (FED.) ¶ 445 (Nov. 5, 1979); 102 LAB. REL. REP. (BNA) 178 (1979). Uniroyal was the eighth government contractor to be debarred during the past two years for violating the requirements of Exec. Order No. 11,246. In April 1979, the Labor Department debarred Loffland Brothers Co., one of the world's largest oil drilling companies, for failing to maintain an affirmative action plan pursuant to its responsibilities as a government contractor under Exec. Order No. 11,246. 3 EQUAL EMPLOYER (FED.) ¶ 178 (May 7, 1979).

<sup>251</sup> The feminist economist Francine Blau has made recommendations for more effective enforcement of sex discrimination law. F. BLAU, EQUAL PAY IN THE OFFICE 108-11 (1977). Her recommendations, based on a very detailed statistical analysis, are for deployment of enforcement resources in the "traditional" areas of hiring and promotion. *Id.* at 103-04. Blau's analyses show that it is in hiring and promotion, and not in equal pay,

In response to these considerations, supporters of the comparable worth idea say that the law as it is does not work: they claim that jobs remain largely segregated and that the wages of women and minorities are not rising.<sup>252</sup> The first part of this response is a *non sequitur*, for sex segregation in the workplace is already a prime focus of Title VII, and no new force against sex segregation would be created by implementation of the comparable worth idea. Indeed, comparable worth would tend to inhibit the movement of women into non-traditional jobs.<sup>253</sup>

The argument that the relative wages of minorities and women are not increasing is mistaken. Wages of blacks relative to those of whites have risen in recent years, and the relative wages of black women have risen more than those of any other group in American society for whom figures are available.<sup>254</sup> For women generally, both black and white, the proportion of women in traditionally male jobs increased greatly in the 1970's.<sup>255</sup> Although

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that the major problem resides. *Id.* at 24, 103-04. Like most economists, Blau does not even discuss wage discrimination in the sense that Professor Blumrosen uses the term.

Blau points out that inefficient patterns of enforcement have serious consequences:

[T]he current structure appears to militate against uniform and timely enforcement of the law. Under the present system, it is possible that some employers will be deluged by investigators from different agencies, subjected to conflicting compliance requirements, and forced to defend themselves against the same discrimination charge in a seemingly endless number of forums. Other employers (one suspects the majority) may not be subjected to any serious pressure to conform to the antidiscrimination statutes and regulations. At the same time, victims of discrimination languish as their complaints remain unprocessed.

*Id.* at 107.

<sup>252</sup> *Wage Discrimination*, *supra* note 1, at 402-415. See address by EEOC Commissioner J. Clay Smith, *supra* note 9, at E-2.

<sup>253</sup> See part III *supra*.

<sup>254</sup> Between 1960 and 1970,

[b]lack female hourly earnings, adjusted for age and schooling, rose 82 percent compared with 68 percent for black males and 53 percent for white females. By 1969, hourly earnings of black females were only 15 percent less than those of white females of comparable age and schooling, while for women with more than twelve years of schooling the adjusted color differential had practically disappeared.

Fuchs, *Women's Earnings: Recent Trends and Long-Run Prospects*, MONTHLY LAB. REV., May 1974, at 23.

<sup>255</sup> For example, between 1970 and 1978, the proportion of accountants who are women rose from 25.3% to 30.1%, a 19% increase; for engineers the corresponding increase was 75%; for lawyers and judges, 100%; physicians and osteopaths, 27%; and nonfarm managerial-administrative officials, 41%. U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: SOME NEW DATA, SERIES 3 at Table 4 (Report No. 575, 1979). One indirect but impressive index of women's rising status in business is the recent increase in airline business travel by women. In 1979, business travel by women accounted for 17% of all U.S. airline revenue from business travel, an increase from 13% in 1977 and from only 1% in 1974. *Women Travelers Find Safety and Harassment Can be Major Problems*, Wall St. J., March 5, 1980, at 1, col. 1. The progress shown in these figures contrasts with the stasis conveyed by the statistics cited in *Wage Discrimination* because that article is

the overall ratio of female to male earnings has remained almost constant, in recent years that ratio has been maintained in the face of a very large influx of women entering the labor force for the first time. After adjustments for the temporarily large proportion of *new* women workers, the relative wages of women have risen.<sup>256</sup>

Thus, changes *are* occurring in the status and the wages of women and minorities. No doubt Title VII and the EPA have contributed to those changes. But such changes are of a magnitude much greater than can be attributed to the law alone. If the fundamental arrangements within human society — arrangements such as the institution of the family itself and the division of labor within the family — are of glacial solidity, it is apparent that late in the twentieth century the United States is experiencing an increasingly rapid thaw of the glacier. With or without comparable worth theory, the rationalizations for discrimination against women in the workplace are moribund. Implementation of Professor Blumrosen's drastic remedies would do little to hasten those epochal changes in our society. Rather, the result would be enormous inflationary stresses on the economy, with attendant real losses for the majority of women as well as men.<sup>257</sup>

### CONCLUSION

This article has demonstrated that wage differences between different jobs performed by men and women are not subject to the remedial framework of Title VII. The argument that a Title VII remedy should be judicially mandated because wage discrimination is an inevitable consequence of the sexual or racial identification of particular occupations should be rejected for two principal reasons. First, no evidence exists that residual wage differentials resulting from discrimination can be detected or quantified by any present social science technique. Second, no basis exists under equal employment opportunity statutes or case law for such a remedy.

This article has asserted that not only the courts but also Congress should refrain from fashioning a "comparable worth" approach to wage differentials. The adoption of a comparable

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almost entirely based on older statistics. The changes in the period 1970-1978 generally were greater than in the entire period 1950-1970. *Id.*

<sup>256</sup> For example, in the 1960's the female-male earnings ration for whites, adjusted for hours, age, and schooling, increased by 4.8%. Fuchs, *supra* note 254, at 23. See *Economic Report of the President, 1974*, quoted in MONTHLY LAB. REV., May 1974, at 22.

<sup>257</sup> See part III *supra*.

worth theory would result in inequitable enforcement, impose crushing economic burdens upon employers and the economy as a whole, reduce the real incomes of more women than it would benefit, and impede the attainment of the ultimate goals of equal employment opportunity.